(22,944)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1912.**

## No. 473.

CLARA A. WHEELER AND FRANK S. LUSK, APPELLANTS,

*vs.*

CITY AND COUNTY OF DENVER, ALBION K. VICKERY, AUDITOR; LEWIS C. GREENLEE, TREASURER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

**INDEX.**



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 21, 1912.

1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered, that heretofore, and on, to-wit, the twenty-first day of June, A. D. 1911, came Clara A. Wheeler and Frank S. Lusk, who sue on behalf of themselves and all other taxpayers similarly situated, by Edwin H. Park, Esquire, their solicitor, and filed in said court their bill of complaint; and sued out of and under the seal of said court a subpœna in chancery against The City and County of Denver, Albion K. Vickery, as Auditor of said City and County of Denver; Lewis C. Greenlee, as Treasurer of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claiming to be and assuming to act as members of and constituting an alleged pretended body called the Public Utilities Commission of said City and County of Denver.

And the said bill of complaint is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the United States Circuit Court of the Eighth Judicial Circuit in and for the District of Colorado. In Equity.

2 No. —.

CLARA A. WHEELER and FRANK S. LUSK, Who Sue on Behalf of Themselves and All Other Taxpayers, etc., Complainants,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation of the State of Colorado; Albion K. Vickery, as Auditor of said City and County of Denver; Lewis C. Greenlee, as Treasurer of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, Claiming to be and Assuming to Act as Members of and Constituting an Alleged Pretended Body Called the Public Utilities Commission of said City and County of Denver, Defendants.

To the Honorable Judges of the Circuit Court of the United States of the Eighth Judicial Circuit in and for the District of Colorado:

Clara A. Wheeler, a citizen and resident of the state of Nevada, and Frank S. Lusk, a citizen and resident of the state of Montana, who sue for and on behalf of themselves and all other taxpayers similarly situated, who are numerous and whose names and residences are to your orators unknown, and who may come in and contribute to the expenses of this action, present this their bill against the City and County of Denver, a municipal corporation of the state of Colorado, Albion K. Vickery as Auditor of said City

and County of Denver, Lewis C. Greenlee as Treasurer of
3 said City and County of Denver, and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claiming to be and assuming to act as members of and constituting an alleged pretended body called the Public Utilities Commission of said City and County of Denver, all residents and citizens of the state of Colorado, and thereupon your orators complain and say:

1. That the said complainant, Clara A. Wheeler, is now and at all the times hereinafter mentioned, was a citizen and resident of the state of Nevada; that the said complainant, Frank S. Lusk, is now and, at all the times hereinafter mentioned, was a citizen and resident of the state of Montana.

2. That at all the times hereinafter mentioned the said defendant, the City and County of Denver, was and still is a municipal corporation, at present claiming its existence and charter powers by, through and under Article 20 of the constitution of the state of Colorado, and an alleged pretended charter adopted in pretended furtherance thereof, and is and was at all the times hereinafter mentioned a citizen and resident of the state of Colorado.

3. That at all the times hereinafter mentioned said defendant, Albion K. Vickery, was and is the duly elected, qualified
4 and acting Auditor of said defendant, City and County of Denver, and is and was at all the times aforesaid a resident and citizen of said state of Colorado; that at all the times hereinafter mentioned said Lewis C. Greenlee was and still is the duly elected, qualified and acting Treasurer of said City and County of Denver, and is and was at all of said times a citizen and resident of said state of Colorado; that said Auditor and Treasurer, respectively, of said City and County of Denver, are, by the charter thereof, required to audit, approve and pay bills and warrants for expenditures made for or on behalf of said municipality, and the terms of Section 264*a* of said charter, hereinafter referred to, purport to require such auditing, such approval and such payment of all warrants issued by, and all indebtedness incurred by, or on behalf of said Public Utilities Commission without any discretion whatsoever upon the part of said Auditor or said Treasurer.

4. That at all the times hereinafter mentioned, on and after the general city election, held in and for the said defendant, the City and County of Denver, in the month of May, A. D. 1910, the said defendants, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, have and do claim to be and assume to act as members of and as constituting an alleged pretended body or board called
5 the Public Utilities Commission of said City and County of Denver, under and in pursuance of the alleged adoption of a so-called alleged amendment to the charter of said City and County of Denver, hereinafter set forth in paragraph 6 of this bill and designated for brevity as "Section 264A," and that said last-named defendants were and still are residents and citizens of the state of Colorado.

5. That the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000);

that this is a controversy wholly between citizens and residents of different states, to-wit, between the said Clara A. Wheeler, who is now and at all the times hereinafter mentioned was a citizen and resident of the state of Nevada, and the said Frank S. Lusk, who is now and at all the times hereinafter mentioned was a citizen and resident of the state of Montana, as complainants, and the defendants herein, each of whom is now and at all the times hereinafter mentioned was a citizen and resident of the state of Colorado.

6. That at the general city election held in and for said defendant, the City and County of Denver, in the month of May, A. D. 1910, it was and is claimed that there was adopted at said election by the votes of a majority of the qualified electors voting at said election thereon a so-called alleged amendment to
6 the then alleged charter of said City and County of Denver, which said amendment is designated as "Section 264A," which was and is substantially in words and figures as follows, to-wit:

SECTION 264*a*. Nothing in the preceding sections or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a water works *or* supplying the city and county of Denver and its inhabitants with water for all uses and purposes, but a public utilities commission is hereby created, to consist of three members, to have complete charge and control thereof, and to have and exercise all the powers given to the board of public works in Chapter IX, as to all public utilities. Except as herein provided, each member of said commission shall be elected for a term of six years and shall serve until his successor is elected and qualifies, and his salary shall be four thousand dollars per annum, payable in equal monthly installments by the treasurer out of the general fund upon the warrant of the commission, and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are hereby elected as the first members of said commission to serve, in the order named, from the date of their election to June 1, 1912, June 1, 1914, and June 1, 1916, respectively, and until their successors are elected and qualify. The names of all candidates hereafter nominated for members of said commission shall appear on the official ballot without any party designation in connection therewith. Each commissioner shall give bond in the sum of $10,000 in the manner provided in section 152 of the charter. Said commission shall have power to employ a ceretary and such legal and technical help as it may deem necessary, and shall, subject to the civil service provisions of this charter, hire all other employés, and shall fix and pay all salaries and wages and shall fix and collect all rates and charges for any service under
7 its control, which rates and charges shall be made as low as good service will permit. Said commission may adopt reasonable rules and regulations with reference to such service. It shall make an itemized monthly statement of all moneys received and paid out by it, a copy of which it shall file with the city auditor, and shall daily turn over to the city treasurer, as provided in section 260, the money receieved by it, said money to be paid out by the treasurer only upon the warrant of said commission. Said commission shall

have and exercise all the powers of the city and county granted in the constitution or named in the charter in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto. It shall institute and defend all litigation affecting its duties and powers or in relation to its trusts and all expenses thereof shall be paid by the treasurer out of the general fund upon the warrant of the commission, and it may also call to its assistance the city attorney or any other department of the city government. Except as in this section provided, the city and county shall never purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained authorizing the same, and wherever in any ordinance or contract the former city of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, the term "city" used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise. No plant owned, acquired or constructed by the city and county and no water rights owned or acquired by the city and county shall ever be sold,
leased or otherwise disposed of except upon a vote of the quali-
8 fied electors first had and obtained, and the same shall be
under the sole control and management of said commission. Any member of said commission may be recalled and his successor named at any time in the manner provided by the recall section of this charter. Any vacancy shall be filled by the remaining members of the commission and such appointee shall serve until the next municipal election and until his successor is elected and qualifies. Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the City and County of Denver, shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes, said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient denominations of not more than one thousand dollars each and bearing four and one-half per centum interest per annum of such date and in such form and maturing at such time as may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issuance of said bonds or to the full exercise of all the powers given it, in the form recommended by the commission, and without amendment, and the mayor shall sign the same. Said commission shall issue said bonds only from time to time as they are required for actual use or sale, and the mayor shall sign them and the clerk shall sign and attest them under the seal of the city and the auditor shall register them, with the approval of the president of said commission endorsed thereon. No such bonds shall be used

or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may be called for redemption and redeemed by the commission in like manner as provided in section 314. If the Denver Union Water Company shall place in escrow with the Continental Trust
9 Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company and the same shall constitute a binding contract of purchase. In that event then at a special election which the council shall call within sixty days after the adoption of this amendment, to be held on the first Tuesday in September, 1910, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said trust company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on it the words "For the issuance of eight million dollars in bonds for the purchase and repair of the existing water plant under the provisions of section 264*a* of the charter," and on a separate line the words, "Against the issuance of eight million dollars in bonds for the purchase and repair of the existing water plant under the provisions of section 264*a* of the charter," with a space opposite each such line in which the voter may make his mark indicating his vote. In case The Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election
10 aforesaid, in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes. Said ballot shall have printed on it the words, "For the issuance of eight million dollars in bonds for the construction of a new municipal water plant," and on a separate line the words, "Against the issuance of eight million dollars in bonds for the construction of a new municipal water plant," with a space opposite each such line in which the voter may make his mark indicating his vote. Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used by it to construct and put into operation a complete system of water works for sup-

plying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same. The said commission shall, immediately upon its election, in case The Denver Union Water Company has not accepted the seven million dollars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the City and County of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the city and county of Denver and the inhabitants thereof and may submit an alternative bond proposition at said special election for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof by any of the ways within its powers herein mentioned, and the same shall be placed on said ballot in such form as said commission may determine, and it may also submit any proposition concerning its powers or trust at any municipal election in like manner. If a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted, and in
11 case alternative propositions are submitted, and each receive a majority, then the one receiving the greater affirmative vote shall be the one adopted. Such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for and the same, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid, and the provisions in this section relative to the issue, sale and redemption of bonds shall apply thereto. Any provisions of the charter in conflict herewith is hereby repealed.

Your orator avers that said Section 264-*a* is not now and never was a part or portion of the charter of the City and County of Denver, nor was it at said election in the month of May, A. D. 1910, or at any other time thereafter, down to the time of the filing of this bill, properly or at all adopted as such, nor was it at said election properly or at all submitted to the votes of the qualified electors of said City and County of Denver, nor was it at said election or at any time properly or at all voted, authorized or adopted by a majority of the electors qualified to vote thereon, for the reason, among others, that said socalled section 264-*a* was by the ordinance purporting to authorize its submission, by the notice of the election thereon and by the form in which it was printed upon the ballot and required to be voted upon by the qualified electors, submitted to such vote as an entirety, with no option, privilege, right or opportunity
12 to the voter at such election to express his will thereon except by a vote in favor of its adoption, including all of the various and sundry matters and things therein contained, expressly or by implication, or by a vote against its adoption, which necessarily would include a vote against each and every of the several distinct propositions and things therein contained and set forth, either expressly or by implication; that said Section 264 A, submitted in the manner aforesaid, contained numerous, different, independent and unrelated matters not germane one to the other, nor in pari

materia; that among the many different and independent matters, things and questions contained in and submitted by the proposal of said so-called amendment to the charter were the following, to-wit:

(1) The repeal of all other charter provisions relative to the acquisition or operation of a water works -or supplying the city and county of Denver and its inhabitants with water for any and all uses and purposes;

(2) The creation of a Public Utilities Commission, to consist of three members;

(3) The placing in said commission of the complete charge and control of the acquisition or operation of a water works, -or supplying the City and County of Denver and its inhabitants with water for any and all uses and purposes;

13 (4) The granting to said Commission of all the powers given to the Board of Public Works in Chapter IX of said charter, as to all public utilities;

(5) Fixing the term of service of the members of said Commission;

(6) Fixing the salary of the members of said Commission, and its method of payment;

(7) Requiring the City Treasurer to pay said salary out of the general fund, upon warrant of the Commission;

(8) The election of Armour C. Anderson as a member of said Commission, without previous nomination in any manner, and to an office which did not exist at the time his name was placed upon the ballot;

(9) The election of Edwin Van Cise as a member of said Commission, without previous nomination in any manner, and to an office which did not exist at the time his name was placed upon the ballot;

(10) The election of A. Lincoln Fellows as a member of said Commission, without previous nomination in any manner, and to an office which did not exist at the time his name was placed upon the ballot;

(11) The fixing of the terms of said first Commissioners named;

14 (12) Providing a new form of ballot, for future elections of Commissioners;

(13) Requiring each Commissioner to give bond and fixing the amount;

(14) Authorizing the Commission to employ a Secretary and such legal and technical help as it may deem necessary;

(15) Authorizing the Commission to hire all other employés subject to the civil service provisions in the charter;

(16) Authorizing the Commission to fix and pay all salaries and wages of such employés.

(17) Authorizing the Commission to fix and collect all rates and charges for any service under its control;

(18) Authorizing the Commission to adopt reasonable rules and regulations with reference to such service;

(19) Authorizing the Commission to receive and pay out moneys

without previous auditing or supervision by the Auditor or any other officer or authority of the City and County of Denver, Contrary to all other provisions of the charter;

(20) Requiring the City Treasurer to pay out moneys received by him from said Commission, upon warrant of said Commission;

(21) Granting to said Commission all the powers of the
15 City and County granted in the Constitution or named in the charter in the matter of constructing, purchasing and condemning, and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes, and everything pertaining or deemed necessary or incidental thereto;

(22) Authorizing the Commission to institute and defend all litigation affecting its duties and powers, or in relation to its trusts, without consulting the City Attorney, and without availing itself of his services;

(23) Requiring the City Treasurer to pay all expenses of such litigation out of the general fund, upon the warrant of the Commission;

(24) Authorizing the Commission to call to its assistance the City Attorney or any other department of the City government;

(25) Denying to the City and County of Denver the right ever to purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation, except upon a vote of the qualified electors first had and obtained authorizing the same;

(26) Amending all previous ordinances or contracts of
16 the former city of Denver, by which said city was given the right of the present City and County of Denver now has the privilege or power to purchase or acquire any water system or plant, by providing that the term "City," used in any such ordinances or contract, shall be taken and held to mean the qualified electors of the City and County, and not otherwise;

(27) Amending all ordinances or contracts of the former City of Denver, whereby said city was given the right or the City and County of Denver now has the privilege or power to extend any contract with reference to any such water system or plant, by providing that the term "City," used in any such ordinance or contract, shall be taken and held to mean the qualified electors of the City and County, and not otherwise;

(28) Prohibiting the sale, lease or other disposition of any plant owned, acquired or constructed by the City and County, or any water rights owned or acquired by said City and County, except upon a vote of the qualified electors first had and obtained;

(29) Providing that all such plants and water rights shall be under the sole control and management of said Commission;

(30) Providing for the recall of any member of said Commission;

(31) Providing for the filling of all vacancies in said
17 Commission by the remaining members thereof;

(32) Authorizing the creation of an indebtedness in the

sum of $8,000,000.00 to provide a municipal water plant or system, and everything incidental or necessary thereto for supplying the City and County of Denver and its inhabitants with water for all uses and purposes;

(33) Providing that said indebtedness be evidenced by bonds of the par value of $8,000,000.00 in convenient denominations, of not more than $1,000.00 each and bearing four and one-half per cent interest per annum;

(34) Granting to the Commission the power to fix the date, form and time of maturity of said bonds;

(35) Requiring the City Council to pass such ordinances as the Commission may deem necessary respecting the issuance of said bonds;

(36) Requiring the City Council to pass such ordinances as said Commission may deem necessary respecting the full exercise of all the powers given it;

(37) Requiring the City Council to pass all such ordinances in the form recommended by the Commission, without amendment;

(38) Requiring the Mayor to sign all such ordinances;

(39) Authorizing the Commission to issue said bonds from time to time as they are required for actual use or sale;

18 (40) Requiring the Mayor to sign all such bonds as the Commission may issue;

(41) Requiring the City Clerk to sign and attest, under the seal of the City, all such bonds as the Commission may issue;

(42) Requiring the Auditor to register all such bonds;

(43) Providing that such bonds shall not be sold at less than par, nor except after advertisement, as in the Charter provided for the sale of public improvement bonds;

(44) Providing that said bonds may be called for redemption and redeemed by the Commission, in like manner as provided in Section 314 of the Charter;

(45) Authorizing a binding contract between The Denver Union Water Company and the City and County of Denver for the purchase by the city of all of the property included and embraced in the appraisement hereinabove described, and fixing the terms of said contract;

(46) Requiring the City Council, within sixty days after the adoption of said Section 264-*a*, to call a special municipal election to be held on the first Tuesday in September, 1910;

(47) Requiring in the event of the acceptance by The
19 Denver Union Water Company of said contract of purchase, the submission at said election to the qualified taxpaying electors of the question of issuing $8.000,000.00 in bonds, of which $7,000,000.00 at par are directed to be used in completing the said purchase, and the other $1,000,000.00 are directed to be sold or used by the Commission to improve, repair and add to the water plant so purchased;

(48) Directing the form of ballot to be used in that event at such election;

(49) Requiring that in the event said The Denver Union Water

Company shall not accept said contract of purchase as aforesaid, then at said special election there shall be submitted to the qualified taxpaying electors the question of issuing $8,000,000.00 in bonds, to be sold or used to construct and put into operation a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes;

(50) Providing the form of ballot to be used in that event at said election;

(51) Requiring that such bonds, or so much thereof as the Commission may deem necessary, shall be sold or used by said Commission to construct and put into operation a complete system of water works for supplying said City and County and all its in-
20 inhabitants with water for all uses and purposes;

(52) Requiring said Commission forthwith to proceed to construct such complete system of water works;

(53) Requiring said Commission forthwith, upon its election, to proceed to make a careful investigation of the value of the plant of The Denver Union Water Company for the uses and purposes of the City and County of Denver and its inhabitants;

(54) Requiring said Commission to proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof;

(55) Authorizing said Commission to submit at said special election an alternative bond proposition for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant, or any part thereof, by any of the ways within its power mentioned in said Section 264-*a;*

(56) Requiring that said alternative bond proposition be placed on the ballot for such election, in such form as said Commission may determine;

(57) Authorizing said Commission to submit any proposition concerning its powers or trusts at any municipal election in like manner;

21 (58) Providing that if a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted;

(59) Providing that in case alternative propositions are submitted, and each receives a majority, then the one receiving the greater affirmative vote shall be the one adopted;

(60) Providing that such adoption shall be sufficient authorization for the issuance of the bonds thereby provided for;

(61) Providing that said bonds, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid;

(62) Providing that any such bonds shall be issued, sold and redeemed solely as in said Section 264 A provided;

(63) Repealing all provisions of the Charter in conflict with said Section 264 A of which there are many;

(64) Committing the City and County of Denver to the municipal ownership or operation of the water plant or system sup-

plying water for said City and County of Denver and its inhabitants for all purposes;

(65) Depriving the City and County of Denver and the qualified taxpaying electors thereof of all power to grant a new franchise relating to any street, alley or public place of said City and
22 County for water works purposes.

Your orator further avers that owing to the manner in which said questions were submitted to the people, no qualified elector voting in favor of one or more of the numerous matters and things in said propsed section contained, but opposed to other of said matters and things, could vote for the matters and things, or either of them, which he favored without at the same time voting for all those matters and things therein contained to which he was opposed; that there was room for and there was a fair difference of opinion among the electors of the City and County of Denver qualified to vote and voting at said election in the month of May, 1910, in reference to said various and numerous different questions and matters therein contained, but that it was impossible under the circumstances for the voters to give expression to their will in respect thereto, and the vote taken upon said proposed Section 264A does not indicate and is not a fair or any expression of the will of the voters in regard thereto; that the total registered vote of electors legally qualified to vote on said amendment prior to and for said election in the month of May, 1910, was in number 74,647; that the total number of votes cast at said election by voters legally qualified to vote on said amendment was 61,667; that the
23 number of votes cast both for and against said proposed Section 264A was 23,741 and the number of votes cast in favor of its adoption was 12,342; that the manner of the submission of the question of the adoption or rejection of said proposed amendment 264A violated the Constitution and laws of the state of Colorado and the Charter of the City and County of Denver, particularly Section 179 thereof, and was such as to constitute in law and in equity a fraud upon the electorate, and said proposed amendment 264A has never been legally or at all adopted, is not now in effect, and has no force or validity.

7. Your orator further avers that the said Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are not severally or collectively the duly elected or qualified members of, nor do they constitute, the said Public Utilities Commission of said City and County of Denver, although they are assuming to act as such; that the office for which their names were proposed for election at said election in May, A. D. 1910, had not at any time prior to, nor at the date of, said election been created, nor did it exist; that the said persons were not, nor was either of them, in any manner duly or at all nominated for said office, although in and by the existing Charter of the City and County of Denver, and by the provisions of the statute of the state of Colorado in such
24 case made and provided, it was and is required that no name of a candidate for any office be placed upon the ballot to be used for any election, nor voted upon at such election, un-

less such persons shall be previously duly nominated either at a convention of delegates of a political party, or by a committee duly authorized by such a convention so to do, or by petition as in said statute provided, a certificate of such nomination to be filed in the case of nominations for offices to be filled by the voters of any city or town, with the clerk of said city or town, not more than thirty nor less than fifteen days before election, if made otherwise than by a convention or a committee, and not later than five days after the date of such nomination, if made by convention or committee: and likewise requiring the publication and posting of the lists of nominations in the manner and for the time in said statute provided, and the affording of an opportunity for the filing and determination of objections to said nominations; and likewise requiring every person nominated for any public office to accept such nomination in writing within five days after the filing of the certificate or nomination paper containing the name; and that further, in and by said statute applicable to said election, it was provided that such ballot should contain no other names of persons who were candidates for any office to be balloted for at said election
25 except those nominated in the manner aforesaid, and that the names of the candidates for each office should be arranged under the designation of the office in alphabetical order, so that votes might be cast for or against each candidate individually; and further providing that there should be left at the end of the list of candidates for each different office as many blank spaces as there might be persons to be elected to such office, in which the elector might write the name of any person not printed on the ballot for whom he desired to vote as a candidate for such office.

And your orator avers that each and all of the various requirements hereinabove specified were wholly neglected and disregarded in the case of the supposed election of said Anderson, Van Cise and Fellows, and each of them; that neither of said persons was nominated for the office of member of the Public Utilities Commission by any of the methods in said statutes provided, nor was any certificate of nomination as to any of said persons filed as required, nor was any acceptance thereof made, nor was there any published or posted notice given, as required in the statute, of the fact of such nomination or nominations, nor was any opportunity afforded in any manner to object to said nominations, or either thereof, nor were the names of said candidates, or either of them, printed
26 upon the ballot in the form and manner as required in said statute, nor were the electors afforded an opportunity to vote for or against either of said candidates individually, nor were the electors in any manner afforded an opportunity to vote in favor of any other person or persons whatsoever for said office of member of the Public Utilities Commission.

8. Your orator further avers that said Section 264A was and is wholly invalid and violative of Article XX of the Constitution of the state of Colorado, in this, to-wit, that in and by section 4 of said Article it is provided that the question of granting a franchise relating to any street, alley or public place of the said City and

County shall be submitted to vote of the qualified taxpaying electors of said City and County, upon deposit with the Treasurer of the expense (to be determined by said Treasurer) of such submission by the applicant for such franchise; and in and by section 5 of said Article it is provided that when qualified electors of the City and County of Denver, in number not less than five per cent of the next preceding gubernatorial vote in said City and County, shall petition the Council for any measure, the Council shall submit the same to a vote of the qualified electors at the next general election, not held within thirty days after such petition is filed, and
27 whenever such petition is signed by qualified electors, in number not less than ten per cent of the next preceding gubernatorial vote in said City and County, with a request for a special election, the council shall submit such measure at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; whereas, in and by the terms of said Section 264A, said The City and County of Denver is deprived of all powers relating to supplying the City and County of Denver and its inhabitants with water for all uses and purposes, except as the same are enumerated in said Section 264A; and in and by said Section 264A the said City and County of Denver has no power in regard to such water supply except to acquire by purchase, lease or construction of a municipal waters works plant or system, and to operate the same, and is without power to grant any new franchise relating to any street, alley or public place to any private individual or corporation for the purpose of furnishing such water supply, or to enter into a contract with any private individual or corporation for said purpose.

9. Your orator further avers that said Section 264A is wholly invalid, and was never properly or at all adopted, for the reason that the matters and things therein contained do not constitute a proper or any amendment to the alleged existing Charter of
28 the City and County of Denver, but constitute a wholly new and independent charter or charter provision, complete in itself and relating to the supplying of said City and County of Denver and the inhabitants thereof with water for all uses and purposes; that under and in pursuance of said Article XX of the Constitution of the State of Colorado, it is not and was not at the time of said election in May, A. D. 1910, or at any time prior thereto, proper, legal or permissible to adopt or attempt to adopt, or to submit for adoption as an amendment to the existing charter, and without the calling of a charter convention to consider the same, any new charter or any additional or supplemental charter; but that in all such cases it was and is necessary, and a condition precedent to the submission or adoption of any such new, additional or supplemental charter, that the question of the holding of a charter convention to consider the same should first be submitted to the qualified electors; that thereafter said charter convention, elected and constituted, as in said Article XX provided, should convene and as a representative deliberative assembly consider, adopt and approve said proposed new, additional or supplemental charter,

and that only after such approval by said charter convention could such new, additional or supplemental charter be submitted
29 to the qualified electors for their approval and adoption or rejection; and that all of these matters were entirely neglected in reference to the submission and supposed adoption of said Section 264A; that no charter convention in reference thereto was held or attempted to be held, nor was the question of the holding of such a convention submitted or attempted to be submitted to the qualified electors; but that said matter alleged to constitute said Section 264A was immediately placed upon the ballot and submitted to the vote of the electors, without previous consideration, deliberation or reflection by the representatives of said electors in charter convention*ed* assembled, or otherwise, or at all.

10. Your orator further avers that Article XX of the Constitution of the state of Colorado, under which the present Charter of the City and County of Denver was adopted, and all acts and steps taken thereunder, including the supposed adoption of said section 264A, were and are unconstitutional and invalid, for the reason that said Article XX of the Constitution of the state of Colorado, as well as said section 264A, and the method of its supposed adoption are in violation of section 4, Article IV of the Constitution of the United States, guaranteeing to and requiring in the state of Colorado a Republican form of Government, as well as in violation of section 4 of the Act of Congress approved March 3, 1875, and
30 entitled "An Act to Enable the People of Colorado to Form a Constitution and State Government, and for the Admission of said State into the Union on an Equal Footing with the Original State-," wherein and whereby it is required that the Constitution of said state of Colorado shall be Republican in form and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence; and likewise in violation of section 2, Article II and Section 1, Article V of the Constitution of the state of Colorado, for the reason that said Article XX and said section 264A destroy a Republican form of Government in a portion of the state of Colorado and the exercise of powers vested exclusively in the General Assembly of the state of Colorado; and for the further reason that said Article XX is in violation of section 2 of Article XIX of the Constitution of the state of Colorado, in that said Article XX was not submitted to the people of the state of Colorado in accordance with the requirements of the Constitution of said state; that said Article XX contained and contains more than one amendment to said Constitution as it then existed, and that each separate amendment was not voted upon separately; that said Article XX was not in the nature of an amendment to the then existing Constitution, but an addition thereto, and that either as an
31 addition or an amendment it attempted to amend and did alter and amend more than six previously existing articles of said Constituion.

11. Your orator further avers that notwithstanding the matters and things hereinabove set forth, the said Anderson, Van Cise and Fellows claiming to be and assuming to act as members of and con-

stituting said Public Utilities Commission, and acting solely and only under and by virtue of the authority claimed to be conferred thereby, did, subsequent to the supposed adoption of said section 264 A, and prior to the 16th day of July, A. D. 1910, cause to be prepared and introduced in the City Council of said City and County of Denver an ordinance, which said City Council, acting under the supposed authority and direction of said section 264 A, and believing itself compelled thereby, passed, ordained and enacted, the same having been approved by the Mayor on said July 6th, 1910, being known as Ordinance No. 98, Series of 1910, and purporting to call and requiring the holding of an election on the first Tuesday in September, 1910, for the purpose of submitting to vote the question of issuing eight million dollars ($8,000,000) in bonds for the construction of a new municipal water plant as in said section 264 A commanded; that thereafter, pursuant to said section 264 A and said Ordinance No. 98, and on the first Tuesday in September, A. D. 1910, to-wit, September 6th, in said year, said election was
32 held with the result that the issuance of said bonds was approved by a majority of the persons voting upon said question; that, as your orator is informed and believes, the expense of said election incurred by said persons acting as the Public Utilities Commission and paid out of the public funds of said City and County of Denver at their instance, amounted to more than thirty-one thousand dollars ($31,000).

12. Your orator further avers that none of the provisions and requirements of Article IX of the existing Charter of the City and County of Denver, in respect to the acquisition by purchase, condemnation, construction or otherwise, by said City and County, of any public utility, work or way have been in any manner or at all observed or fulfilled, either in respect to the acquirements by purchase, condemnation or otherwise of the water-works system or plant of The Denver Union Water Company or any part thereof, or in respect to the acquisition of a new, independent and complete system of water-works by construction or the authorization or issuance of bonds for that purpose, or the submission to the qualified electors of the question of authorizing or issuing such bonds, but on the contrary all of said provisions of Article IX of said existing charter of the City and County of Denver, as well as other provisions of said charter relative to the submission of the question of issuing
33 said bonds, and the form thereof, and the method of their issuance and payment, have been violated by said section 264 A, said Ordinance No. 98 and said election held thereunder, and will be further violated by the issuance of all or any of the bonds authorized thereat or by the use of the same in any manner for the purpose contemplated, in that said Article IX of the Charter in respect to the acquisition by purchase, condemnation, construction or otherwise of any public utility, work or way, provides and provided that the same cannot be acquired by purchase, condemnation, construction or otherwise, except upon the filing of a petition signed by qualified electors in number not less than twenty-five percent of the next preceding vote for mayor, describing the proposed public utility, work or way, and requesting the acquisition of

the same, and except after investigation and report by the Board of Public Works covering the method of such acquisition, the probable cost thereof, the preparation of specifications, plans and details for that purpose, the determining as to whether the same can be operated by the City and County at a profit or advantage, either in quality or cost of service, and a report of the conclusions of said Board to the Mayor and Council in writing; and in case such report is favorable, the legal opinion of the City Attorney on all
34 matters of law involved in such proposition, the concurrence or non-concurrenec of the Mayor therein, the preparation by the Board of Public Works of full specifications, plans and details, with a revised estimate of the total maximum cost, the submission to the City Council of a bill for an ordinance providing for the acquisition of such public utility, and setting forth the full description thereof, the revised total maximum estimated cost, the manner in which it shall be acquired and the maximum amount of bonds to be issued, the number of installments and time when such bonds shall mature and the rate of interest thereon, the passage by both branches of the City Council and the approval by the Mayor of such ordinance, and finally the submission to the qualified tax-paying electors of the question of issuing the bonds necessary for the purpose of said acquisition; all of which requirements were existent and controlling at all times at, prior and subsequent to the supposed adoption of said section 264 A, the passage of said Ordinance No. 98, Series of 1910, and the hol-ing of said election on the first Tuesday in September, 1910, and are still in effect and none of which were in any manner complied with in respect to any of said matters.

13. And your orator further avers that heretofore and on, to-wit August 22nd, 1910, The New York Trust Company, Trustee,
35 in the mortgage or deed of trust of The Denver Union Water Company, filed in this court its bill of complaint in equity, wherein the City and County of Denver, Albion K. Vickery, as Auditor of said City and County of Denver, the said Public Utilities Commission, and the members thereof, said The Denver Union Water Company and others were named as defendants, said cause being numbered 5572 of the actions then proceeding in this court; that thereafter and on, to-wit, August 25, 1910, said The Denver Union Water Company filed in said cause its cross bill against said the City and County of Denver, Albion K. Vickery, as Auditor of said City and County, and said Public Utilities Commission, and the members thereof, and others, as defendants; that in and by said bill and cross bill, it was prayed, among other relief sought, that an injunction, both temporary and permanent, be issued against the defendants thereto, to prevent the issuance of said eight million dollars ($8,000,000) in bonds, as in said section 264A and Ordinance 98 of the Series of 1910 provided, upon the ground, among other things, that said section 264A was wholly invalid, because it impaired the obligation of prior existing contracts between said City and County of Denver of the one part, and said The Denver Union Water Company and its trustee, said The New York Trust Company,

of the other, to-wit, the prior existing contract evidenced by
36 ordinance 44, Series of 1890, of the ordinances of the City of Denver, being an ordinance covering the relations between said parties in reference to a supply of water to the City and County of Denver and the inhabitants thereof, and, because of such impairment of said prior existing contract, in conflict with and contrary to section 10 of Article I of the Constitution of the United States and Section 11 of Article II of the Constitution of the State of Colorado; that thereafter and on, to-wit, September 6, 1910, the court, having jurisdiction of the subject-matter and of the parties in said cause, did, on application of said complainant and of said cross-complainant, issue its writs of temporary injunction, restraining the said defendants as prayed in said bill and cross-bill respectively from which orders granting said writs of injunction certain of said defendants to said original bill and said cross-bill, to-wit, among other defendants said The City and County of Denver, said Vickery as Auditor thereof, and the said Public Utilities Commission and the members thereof, did thereafter and on, to-wit, September 21, 1910, pray appeals to the Circuit Court of Appeals for the Eighth Circuit, and the same were granted; that thereafter said appeals were lodged in and heard by said Circuit Court of Appeals, which last named court by an opinion filed and orders made on, to-wit, May 19, 1911, affirmed said orders granting said temporary writs of injunction, for the reason, as stated in said opinion, that said section
37 264A did, by its terms, impair the obligation of said prior existing contract between said City and County of Denver of the one part, and said The New York Trust Company and The Denver Union Water Company of the other, by reason whereof said section 264A was in violation of the Constitution of the United States and of the State of Colorado, and invalid and insufficient to authorize the said defendants to do any of the acts sought to be prevented by said injunction, all of which will more fully appear in said opinion of said Circuit Court of Appeals, reference to which is hereby made.

That as a result of said decision and the application of the principles of law therein announced, said section 264A is and must be wholly invalid in every particular, and in each and every part thereof, and insufficient to authorize the expenditure of any of the public moneys of said City and County or the doing of any other act under or pursuant to its terms. That said cause is still pending and has not reached final decree.

14. Your orators further aver that notwithstanding all of the matters and things hereinabove stated, the said Anderson, Van Cise and Fellows have and do continue and assume to act as members of and constituting said Public Utilities Commission, and in that capacity and under and by virtue of the supposed authority
38 of said section 264A, and not otherwise, continue to incur numerous and heavy expense of every conceivable description and cause the same to be paid out of the public moneys of the City and County of Denver; that they have employed attorneys, secretaries, experts and other agents and representatives, paying them as well as paying their own salaries fixed by said section 264A, by war-

rants upon the Treasury of said City and County of Denver, which, under the terms of said section 264A, the Auditor and Treasurer of said City and County of Denver are required to audit and pay; that the expenditures so made by said persons out of the public funds of said City and County exceed, as your orators are informed and believe, the sum of twenty-five thousand dollars ($25,000); and as your orators are informed and believe, there are now outstanding bills incurred and warrants issued by said persons, acting as the Public Utilities Commission, and aggregating a considerable sum of money, which soon will be presented for payment; that said persons are continuing to incur said expense and propose to so continue in the future unless prevented by order of court; that the City Council has appropriated, for the use of said Public Utilities Commission during the current year, the sum of forty-five thousand dollars ($45,000) of which there now remains unexpended about the sum
39 of nineteen thousand dollars ($19,000).

15. Your orator, the said Clara A. Wheeler, further avers that she is the owner of the following described real property situate in the City and County of Denver and State of Colorado, to-wit:

An undivided one-sixth interest in each of the following described tracts: Lots one (1) to six (6), both inclusive, block two eighty-five (285), Clements' Addition; lots seventeen (17), eighteen (18), nineteen (19) and twenty (20), block one hundred and fourteen (114), Stiles' Addition; lots thirty-seven (37) and thirty-eight (38), block nineteen (19), Park Avenue Addition; lots twenty-three (23), to thirty-two (32), both inclusive, block one hundred and twenty-four (124) Clements' Addition; lots five (5) and six (6), block one hundred and ten (110), East Denver; lots fifteen (15) and sixteen (16), and the north half of lot seventeen (17), block two hundred ninety-nine (299), Clements' Addition; lots twenty-nine (29) and thirty (30), block one hundred and twenty-six (126), East Denver; lots twenty-three (23) and twenty-four (24), block forty-one (41), East Denver; lots twenty-three (23) and twenty-four (24), block forty (40) East Denver; lots twenty-one (21) and twenty-two (22), block one hundred twenty-nine (129), East Denver; lots seven (7)
40 and eight (8), block one hundred sixty (160), East Denver; lots seven (7) and eight (8), block one hundred fifty-nine (159), East Denver; lots one (1) and two (2), block one hundred twenty-six (126), East Denver, and a portion of lots two (2) and three (3), and the west thirty-two (32) feet of lot one (1), block two hundred forty-one (241), West Denver; also the entire title in and to the following described, to-wit, lot four (4) and the south half of lot three (3), block fourteen (14), amended map of St. James Heights.

That the assessed valuation of all of said property so owned for the year 1910 was thirty-two thousand eight hundred and sixty-six dollars ($32,866); and that within the past year there has been constructed and now stands upon said lots, in block fourteen (14), St. James Heights, the property of your orator, a dwelling house having an assessable valuation for purposes of taxation of not less than $2000, which was not included in the assessment for the year 1910,

but will be included in such assessment for the year 1911 and subsequent years.

That your orator, Frank S. Lusk, is the owner of the following described property, situate in said City and County of Denver, to-wit, lots thirty-one (31) to thirty-four (34) in block nine (9), First Addition to Arlington Heights, which property was assessed for taxation for the year 1910 at a valuation of $4,200; that the as-
41 sessed valuation for purposes of taxation of all of the property within said City and County of Denver for the year 1910 was $135,467,050; that the assessments for the year 1911 have not yet been made or announced, but that the ratio between the assessed valuation of your orator's property and of all property within said City and County will not, as your orators are informed and believe, greatly vary in said assessment or in the assessments of future years or a considerable period of time; that the burden of taxation upon your orators' said property, and particularly upon the said property of your orator, Clara A. Wheeler, for the payment of a due proportion of said bond issue and of the interest thereon and of the expenditures heretofore made and proposed and threatened hereafter to be made by said Public Utilities Commission, will exceed the sum of $2,000.

16. That to require your orators and other taxpayers in said City and County of Denver to pay any sum or sums of money whatsoever on account of expenditures, or any expenditures, made or authorized under or pursuant to said section 264A, or on account of said bond issue hereinabove mentioned, would constitute the taking of the property of your orators as well as of all other taxpayers without due or any process of law, the imposition thereon of a wholly unjust, improper and illegal burden, in that said section 264A, and
42 all that has been done or may be done thereunder, not only by said persons claiming to be and to act as the Public Utilities Commission, but also by any others, were, are and will be wholly unwarranted in law and without any authority whatsoever, and all expenditures and proposed expenditures of the public funds by authority of any such matters or things, have been, are and will be unauthorized and an improper waste thereof to the great loss and detriment of your orator as well as all other tax-payers similarly situated.

17. That the tax-payers in the City and County of Denver are very numerous, and unless relief in equity be given, a great multiplicity of suits will be required to be brought to protect said tax-payers against said illegal and improper taxes or to recover the same back if paid; that the imposition of said taxes will be and constitute a cloud upon your orator's title to its said property as well as the title to all other real estate within said City and County; that an accounting is required for the purpose of determining the numerous amounts heretofore disbursed out of the public funds by said individuals claiming to be and acting as the Public Utilities Commission, to the end that said individuals may be required to reimburse the City and County of Denver in said amounts when found and cover the same back into its treasury; that said persons claiming to

be and acting as the Public Utilities Commission are con-
43 tinuing to expend large sums out of the treasury of said City and County, and threatening to continue so to do and will so continue unless prevented by order of this Honorable Court; that your orator has no plain, speedy and adequate nor any remedy at law.

Wherefore, and in as much as your orators are without remedy at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly cognizable and reviewable, they bring this their bill, and pray, the premises considered:

1. That your Honors may grant unto your orator the writ of subpœna, directed to the defendants, The City and County of Denver, Albion K. Vickery as Auditor of said City and County of Denver, Lewis C. Greenlee as Treasurer of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claiming to be and assuming to act as members of and constituting the Public Utilities Commission of said City and County of Denver, thereby commanding each of them, at a certain time and under a certain penalty therein to be named, personally to be and appear before this Honorable Court, then and there to answer all and singular the matters aforesaid (but not under oath, all answers under oath being hereby expressly waived), according to the practice and
44 rules of this court, and to stand to and abide by and perform such orders, directions and decrees as shall be made herein and as to your Honors shall seem equitable and just, including the writ of injunction as hereinafter prayed for.

2. That your Honors may grant to your orator the writ of injunction, issued out of and in accordance with the rules and practice of this Honorable Court, to be directed to the defendants herein named, to restrain the said Anderson, Van Cise and Fellows, and each of them, and the officers, attorneys, agents, servants, employés, representatives and confederates, of them, or any of them, from expending any moneys of the City and County of Denver or incurring any Indebtedness for or on account of said City and County of Denver, or drawing or presenting any warrants upon or against the City and County of Denver for or on account of any matter or thing whatsoever purporting to be authorized by any of the provisions of said section 264A, or anything done thereunder; to restrain the said Vickery as Auditor, the said Greenlee as treasurer, as well as said The City and County of Denver and all officers, agents, servants, employés, representatives and confederates, of them, or either of them, from expending or paying out any moneys whatsoever of the City and County of Denver at the request or on the warrant or by the authority
45 of said supposed Public Utilities Commision, and likewise to restrain them, and each of them, from issuing or attempting to issue said eight million dollars ($8,000,000) of bonds, or any thereof, authorized at said election on the first Tuesday in September, 1910, as hereinabove set forth, and from doing or attempting to do any act or thing tending to accomplish any of such purposes, and that until the application for an injunction can be heard, a re-

straining order of the same effect be granted, and that upon final hearing such injunction be made perpetual.

3. That an accounting may be had of the various and sundry sums of money collected by said Anderson, Fellows and Van Cise, or either of them, or by them or their authority or sanction, disbursed from the treasury of the City and County of Denver by reason of their supposed election and authority as members of the Public Utilites Commission, and that a decree may be entered herein requiring them, and each of them, to reimburse the City and County of Denver therefor and repay the same into the treasury thereof.

4. That section 264A of the charter of the City and County of Denver be declared unconstitutional, null and void and of no effect whatsoever, and that all further action thereunder be forever restrained and enjoined, and all acts heretofore done and steps
46 heretofore taken thereunder be declared to be wholly illegal and improper and without any authority of law.

5. That your orators may have such other, further and different relief as the equity of the case may require and as to your Honors may seem fit, and that they be decreed their costs in this behalf laid out and expended.

CLARA A. WHEELER,
FRANK S. LUSK,
By EDWIN H. PARK,
*Their Solicitor.*

UNITED STATES OF AMERICA,
*District and State of Colorado,*
*City and County of Denver, ss:*

Edwin H. Park, being first duly sworn, on his oath, says: that he is the solicitor for the complainants in the foregoing bill; that said complainants are nonresidents of the state and district of Colorado and are not now within said state or district, and for that reason he makes this verification in their behalf; that he has read the foregoing bill and knows the contents thereof, and that the same is true, except to matters therein stated upon information and belief, and as to those he believes it to be true.

EDWIN H. PARK.

47 Subscribed and sworn to before me this 21st day of June, A. D. 1911.

[Seal U. S. Dist. Court.]

CHARLES W. BISHOP, *Clerk.*

(Endorsed:) 5707. U. S. Circuit Court, District of Colorado. Clara A. Wheeler et al. vs. The City and County of Denver et al. Bill of Complaint. Filed Jun- 21, 1911. Charles W. Bishop, Clerk.

MONDAY, *August 7th, A. D.* 1911.

At Chambers, before the Honorable Robert E. Lewis, District Judge, the following proceedings were had.

In Chancery.

5707.

CLARA A. WHEELER and FRANK S. LUSK, Who Sue on Behalf of Themselves and All Other Taxpayers Similarly Situated,

vs.

THE CITY AND COUNTY OF DENVER; ALBION K. VICKERY, as Auditor of said City and County of Denver; Lewis C. Greenlee, as Treasurer of said City and County of Denver; Arthur C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, Claiming to be and Assuming to Act as Members of and Constituting an Alleged Pretended Body Called the Public Utilities Commission of the City and County of Denver.

Bill for Injunction and for Other Relief.

48 At this day comes William P. Malburn, Esquire, a solicitor of this court, and files and enters herein his appearance and the appearance of Charles S. Thomas, Esquire, W. H. Bryant, Esquire, and George L. Nye, Esquire, as solicitors for and on behalf of Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claiming to be and assuming to act as members of and constituting an alleged pretended body called the Public Utilities Commission of the City and County of Denver.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the Circuit Court of the United States for the District of Colorado.

In Equity.

CLARA A. WHEELER and FRANK S. LUSK, Who Sue on Behalf of Themselves and All Other Tavpayers, etc., Complainants,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation of the State of Colorado; Albion K. Vickery, as Auditor of said City and County of Denver; Lewis C. Greenlee, as Treasurer of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, Claiming to be and Assuming to Act as Members of and Constituting the Public Utilities Commission of the City and County of Denver, Defendants.

*Demurrer.*

49 The Joint and Several Demurrer of Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, Constituting the Public Utilities Commission of the City and County of Denver, to the Bill of Complaint.

And now come the above named defendants, and not confessing any of the matters in the bill to be true, demur to the bill herein filed and say:

The same does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated sufficient to entitle complainants to any relief against these defendants. And the defendants further specially demur to the said bill and say:

1. That the allegations contained in the said bill show that the amount in controversy is insufficient to give this court jurisdiction, for the reason that it is not, exclusive of interest and costs, of the sum of two thousand dollars ($2000.00) as to either or both of said complainants.

2. Because the bill does not state the point of residence of Clara A. Wheeler, one of the complainants, in the state of Nevada, or her post-office address, or the point of residence of Frank S. Lusk, one of the complainants, in the state of Montana, or his post-office address.

Wherefore, defendants pray the judgment of this court whether they shall further answer, and that they be dismissed with their costs.

50

C. S. THOMAS,
W. H. BRYANT,
GEORGE L. NYE,
WM. P. MALBURN,
*Solicitors.*

I, Charles S. Thomas, solicitor for defendants in the above, do hereby certify that the foregoing demurrer in my opinion is well founded in law.

CHARLES S. THOMAS,
*Solicitor.*

Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, defendants in the above named cause, being duly sworn, do say that the foregoing demurrer is not interposed for delay.

ARMOUR C. ANDERSON.
EDWIN VAN CISE.
A. LINCOLN FELLOWS.

Sworn to and subscribed before me this 1st day of September, A. D. 1911. My commission expires January 31st, 1914.

ANDREW T. MONSON,
*Notary Public.*

[NOTARIAL SEAL.]

(Endorsed:) No. 5707. In the United States Circuit Court, of district of Colorado. Clara A. Wheeler and Frank S. Lusk who sue on behalf of themselves and all other taxpayers etc. Complainants versus The City and County of Denver et al. Defendants.
51 Demurrer of the Public Utilities Commission to Bill of Complaint. Filed Sep. 4, 1911, Charles W. Bishop, Clerk. Thomas, Bryant, Nye & Malburn, Attorneys for defendants. 621 629 Ernest and Cranmer Bldg., Denver, Colo.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the Circuit Court of the United States within and for said District.

CLARA A. WHEELER et al., Complainants,
versus
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Motion to Dismiss.*

Come now the defendants Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver, and in their own proper persons as defendants in the above entitled cause, and respectfully petition and move this Honorable Court to dismiss the said cause under the provisions of Section 5 of the Act of March 3rd, 1875, Chapter 137, 18th Statutes, 472; because they say this Honorable Court has no jurisdiction of said cause, in that the same does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, and that the parties

complainant to said cause have been improperly and collu-
52 sively made or joined for the purpose of attempting to create a case cognizable under the laws of the United States and jurisdiction of this Honorable Court.

And in support of this petition and motion the said defendants file herewith the affidavit of Edwin Van Cise, one of your petitioners, and pray that the same may be considered as a part and parcel hereof.

The above named defendants also respectfully petition and move this Honorable Court to dismiss said cause at the costs of the said complainants to be taxed.

CHARLES S. THOMAS,
CHARLES W. WATERMAN,
J. H. GABRIEL,
*Sol'rs for said Defendants.*

WM. H. BRYANT,
GEO. L. NYE,
WM. P. MALBURN,
WM. A. JACKSON,
*Of Counsel.*

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the Circuit Court of the United States within and for said District.

CLARA A. WHEELER et al., Complainants,
53 versus
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Affidavit in Support of Motion to Dismiss.*

STATE OF COLORADO,
*City and County of Denver, ss:*

Edwin Van Cise being first duly sworn according to law deposes and says:

That he is a member of the Public Utilities Commission of said City and County of Denver, and one of the defendants in the above entitled cause.

That he is informed and believes the complainant Frank S. Lusk is a resident and citizen of the city of Missoula and state of Montana, and the complainant Clara A. Wheeler is a resident and citizen of the city of Goldfield and state of Nevada, and were respectively such citizens and residents at and before the time of the institution of this suit.

That the said Frank S. Lusk was a former resident and citizen of Colorado, and was and is a close personal friend of Mr. F. G. Moffat of the City and County of Denver aforesaid, and a gentleman who is interested as a stockholder, or bondholder, or both, or in

some other capacity in the Denver Union Water Company of said City and County of Denver, the said Clara A. Wheeler being a client of Edwin H. Park, Esquire, solicitor for the complainants in this cause.

54 That on or about the 19th or 20th day of June, 1911, the said Moffat by the authority or consent of the Denver Union Water Company, signed and sent to the said Lusk a telegram of which the following is a copy:

Frank S. Lusk, First National Bank, Missoula, Mont.:

Would you be willing as a non-resident taxpayer to bring suit in Federal Court to stop illegal expenditure of public moneys by Utilities Commission if protected by Water Company on expenses and all liabilities? If so, wire me authority in your name to engage attorney and bring suit.

(Signed) F. G. MOFFAT.

That on or about the 20th day of June of said year the said Lusk signed and forwarded a telegraphic answer to said Moffat in words and figures following:

MISSOULA, MONT., 6/20-11.

F. G. Moffat, Denver, Colo.:

Please engage necessary counsel and take proper steps to protect against illegal expenditures by Utility Commission. Am owner of four lots corner Ninth and Sherman, and I object to the proposed expenditures.

(Signed) FRANK S. LUSK.

And affiant further states on information and belief that upon receipt of said telegram the said Moffat, or some one acting for him and for said Denver Union Water Company retained and employed Edwin H. Park, Esquire, in the name of said Lusk, but really for said Water Company, to prepare and file, or to file the bill in

55 this cause; but upon consultation it was discovered that the amount in controversy in said cause with said Lusk as sole complainant was insufficient to confer jurisdiction upon this court; so that it became necessary to procure some other non-resident owning taxable property in said City and County of Denver to join with said Lusk in filing said bill. That the said Park was thereupon authorized to confer with his client the said Clara A. Wheeler with a view of securing her co-operation with the said Lusk as a party complainant to said bill, she to be also guaranteed against all expense in consideration of the use of her name as such complainant. That thereupon and on the 21st day of June aforesaid the said Park signed and sent a telegram to the said Wheeler in words and figures following:

DENVER, COLO., *June* 21, 1911.

Clara A. Wheeler, Goldfield Hotel, Goldfield, Nevada:

Will you permit use of your name in suit here to restrain misuse of taxes by City officials. If so, wire me at once authorizing me to

bring such suit. I advise the bringing of the suit, and will protect you against expenses.

(Signed) EDWIN H. PARK.

That on the same day the said Wheeler answered by telegram in words and figures following:

56 GOLDFIELD, NEVADA, *June* 21, 1911.

Edwin H. Park, E. & C. B'l'd'g, Denver, Colo.:

Yes. Use your judgment in the matter.

(Signed) CLARA A. WHEELER.

That the said bill of complaint had been already prepared on said 21st day of June, and was filed on the 21st day of June, 1911, and on the next day the said Park wrote and mailed a letter to the said Wheeler in words and figures following:

DENVER, COLO., *June* 22, 1911.

Mrs. Clara A. Wheeler, Goldfield Hotel, Goldfield, Nevada.

MY DEAR MRS. WHEELER: On yesterday I wired you for permission to bring a suit in your name against some of the city officials for misuse of taxes, and received your reply authorizing me to go ahead. I brought the suit and filed it on yesterday. The suit is to restrain the Water Commissioners of Denver from further expenditures looking toward the purchase of a water plant by the city of Denver. The city is already enjoined in another proceeding in which the Water Company was a party. Since that time the Water Commission has spent $31,000 to hold an election, and about $25,000 for other purposes; and are seeking to compel the city to pay out on warrants about $20,000 more.

The courts have already held that the amendment to the charter establishing a Water Commission for the purpose of purchasing or building a water plant is unconstitutional and void, and it is our purpose to stop the spending of any more of the people's money in that direction.

57 I desire to bring suit in the Federal Court, and therefore had to get permission of a non-resident taxpayer to bring suit, which accounts for my telegraphing you for permission.

You will not be charged with any expense or costs in the matter, either for court costs or attorney's fees; and I will see that you are absolutely protected in every way from any liability whatever. Thanking you for your permission to bring the suit in your name, I remain

——— ———.

Affiant further states on information and belief that copies of said telegrams and letter were voluntarily furnished to Charles S. Thomas, Esquire, one of affiant's solicitors, on Thursday the 26th

day of October, 1911, and by the said Thomas read to affiant on Friday the 27th inst.

Affiant further says that the facts by him hereinabove set forth clearly indicate that the parties to the said bill were improperly and collusively joined as complainants for the purpose of creating a suit cognizable in this Honorable Court, in the interest, for the benefit and at the cost of the Denver Union Water Company, neither of the said parties complainant having any knowledge of a joinder with the other, or of any connection of the other with the suit or controversy; and having no interest therein which was so imperilled as to cause them to proceed on their own motion and at their own expense. That each was solicited for the use of his and her name, by reason whereof the said bill so improperly and collusively framed and filed is devoid of equity and should be dismissed at complainant's cost.

58 And further affiant saith not.

EDWIN VAN CISE.

Subscribed and sworn to before me this 28th day of October, A. D. 1911. My commission expires Feb. 25, 1915.

[NOTARIAL SEAL.] PATTIE DENNE,
*Notary Public.*

(Endorsed:) No. 5707. In the Circuit Court of U. S. for Colorado. Clara A. Wheeler and Frank S. Lusk, Complainants, versus The City & County of Denver et als., Def't's. Motion and Affidavit to Dismiss. Filed Oct. 28, 1911, Charles W. Bishop, Clerk. Chas. W. Waterman, J. H. Gabriel, Thomas, Bryant, Nye & Malburn. Sol'r's for def't. Public U. Com. 621-629 Ernest and Cranmer B'l'd'g, Denver, Colo.

Sixty-eighth Day, May Term, Tuesday, October 31st, A. D. 1911.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the second day of May, A. D. 1911.

In Chancery.

5707.

CLARA A. WHEELER and FRANK S. LUSK, Who Sue on Behalf of Themselves and All Other Taxpayers, Etc.,

vs.

THE CITY AND COUNTY OF DENVER; ALBION K. VICKERY, as Auditor of said City and County of Denver; Lewis C. Greenlee, as Treasurer of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, Claiming to be and Assuming to Act as Members of and Constituting an Alleged

59 Pretended Body Called The Public Utilities Commission of said City and County of Denver.

*Bill for Injunction and for Other Relief.*

This cause comes on now to be heard on motion of the respondents to dismiss the bill of complaint herein, and is argued by counsel, Edwin H. Park, Esquire, appearing as solicitor for the complainants, and Charles S. Thomas, Esquire, appearing as solicitor for the respondents. And thereupon, on consideration thereof, it seemeth to the court now here that it hath not jurisdiction of this cause;

Wherefore, it is ordered by the court that the said motion be, and the same is hereby, granted, and that the bill of complaint herein be, and the same is hereby, dismissed out of this court, at the cost of the complainants, to be taxed.

In the Circuit Court of the United States for the District of Colorado.

CLARA A. WHEELER et al., Complainants,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Petition for Appeal.*

The above named complainants, conceiving themselves aggrieved by the order and decree of dismissal, made and entered on the 31st day of October A. D. 1911, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors
60 heretofore filed herein and presented herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

EDWIN H. PARK,
*Solicitor for Complainants.*

Dated this 1st day of November A. D. 1911.

The foregoing claim of appeal is allowed.
Dated this 1st day of November, A. D. 1911.

ROBT. E. LEWIS,
*District Judge Holding the Circuit Court of the United States Within and for the District of Colorado.*

(Endorsed:) 5707. U. S. Circuit Court, District of Colorado. Clara A. Wheeler et al., vs. The City and County of Denver et al. Petition for Appeal. Filed Nov. 1, 1911. Charles W. Bishop, Clerk.

Sixty-ninth Day, May Term, Wednesday, November 1st, A. D. 1911.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the second day of May, A. D. 1911.

In Chancery.

5707.

CLARA A. WHEELER et al.
vs.
THE CITY AND COUNTY OF DENVER et al.

61 *Bill for Injunction and for Other Relief.*

This cause comes on now to be heard, Edwin H. Park, Esquire, appearing as solicitor for the complainants;

And thereupon, the complainants pray an appeal to the supreme court of the United States, which is hereby allowed to them; and bond on such appeal shall be in the sum of five hundred dollars ($500).

In the Circuit Court of the United States for the District of Colorado.

CLARA A. WHEELER et al., Complainants,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Assignment of Errors.*

Now come the complainants above named, by their solicitor, and say that in the record and proceedings herein there is manifest error, to their great prejudice, in the following particulars, to-wit:

1. The court erred in granting the motion of the defendants Anderson, Van Cise and Fellows for the dismissal of said cause.

2. The court erred in deciding that the circuit court of the United States for the district of Colorado was without jurisdiction, as a Federal court, to entertain and determine the controversy
62 presented in this cause.

3. The court erred in deciding that this cause did not really and substantially involve a dispute or controversy properly within the jurisdiction of said court as a Federal court.

4. The court erred in deciding that the parties complainant to said cause had been improperly and collusively made or joined for the purpose of attempting to create a case cognizable under the laws of the United States and within the jurisdiction of the court.

5. The court erred in determining that this cause was not within the jurisdiction of the circuit court of the United States for the district of Colorado.

6. The court erred in entering said order of dismissal upon the motion and affidavits presented and showing made thereby.

Wherefore the complainants pray that said order and decree of dismissal be reversed.

EDWIN H. PARK,
*Solicitor for Complainants.*

(Endorsed:) 5707. U. S. Circuit Court, Dist. Colorado. Clara A. Wheeler et al. vs. City and County of Denver et al. Assignment of Errors. Filed Nov. 1, 1911. Charles W. Bishop, Clerk.

63 In the Circuit Court of the United States for the District of Colorado.

CLARA A. WHEELER et al., Complainants,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Certificate of Jurisdictional Question.*

I, Robert E. Lewis, District Judge of the United States within and for the district of Colorado, holding the circuit court of the United States within and for said district, do hereby certify that the above entitled cause did on the 31st day of October, A. D. 1911, come on for hearing before the court upon the motion of the defendants Anderson, Van Cise and Fellows to dismiss said cause for lack of jurisdiction, under the provisions of section 5 of the Act of March 3, 1875, upon the ground that this court has no jurisdiction of said cause, in that the same does not really and substantially involve a suit or controversy properly within the jurisdiction of said court, and that the parties complainant to said cause have been improperly and collusively made or joined for the purpose of attempting to create a case cognizable under the laws of the United States and jurisdiction of this court.

I do further certify that in support of said motion there was presented the affidavit of Edwin Van Cise, and that in opposition to said motion there were presented the affidavits of Edwin H.
64 Park and F. G. Moffatt, and in rebuttal to said affidavit of F. G. Moffat, the affidavit of Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, which said several affidavits constituted all the testimony introduced by the respective parties at said hearing; that said motion and affidavits, hereinabove referred to, are filed in this cause and hereby made a part of the record herein.

That upon said hearing, and upon consideration of said motion and of said affidavits hereinabove mentioned, in opposition thereto and in support thereof, it appearing to the court that the circuit court of the United States did not have jurisdiction to try said cause, for the reason that the same did not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, because the parties complainant to said cause had been improperly and collusively made or joined for the purpose of attempting to create a case cognizable under the laws of the United States and jurisdiction of this court, the said motion was granted

and the said cause was by the court dismissed for want of jurisdiction.

I do further certify that said question of jurisdiction of the circuit court of the United States was the only one involved in said cause upon said hearing, and was the sole question upon which the said cause was dismissed and the final order of dismissal
65 entered, and is the sole question upon which an appeal is prayed; and I do further certify that said question was decided by the Court solely and exclusively upon said motion and upon said affidavits, hereinabove mentioned, which said motion and said affidavits are on file in this cause, and are hereby referred to and made a part of the record herein.

This certificate is given at the same term of court at which said hearing was held and said order of dismissal entered.

Dated at Denver, Colorado, this 1st day of November, A. D. 1911.

ROBT. E. LEWIS,
*District Judge Holding the Circuit Court of the United States for the District of Colorado.*

(Endorsed:) 5707. U. S. Circuit court. District of Colorado. Clara A. Wheeler et al. vs. The City and County of Denver et al. Certificate of Jurisdictional Question. Filed Nov. 1, 1911. Charles W. Bishop, Clerk.

In the Circuit Court of the United States for the District of Colorado.

CLARA A. WHEELER et al., Complainants,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Certificate in the Nature of a Bill of Exceptions.*

66 I, Robert E. Lewis, United States District Judge within and for the district of Colorado, holding the circuit court of the United States within and for said district at the time of all of the transactions hereinafter described, do hereby certify that heretofore and on the 28th day of October, A. D. 1911, the defendants Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows filed herein their motion to dismiss this cause for lack of jurisdiction in the Federal Court to entertain the same, which said motion is in words and figures as appears from the copy thereof incorporated herein and designated by the letter "A."

That at the same time the said defendants filed in support of said motion the affidavit of Edwin Van Cise, which is in words and figures as shown by the copy thereof incorporated herein and designated by the letter "B."

That thereafter and on October 31, A. D. 1911, the said complainants, in opposition to said motion, filed herein the affidavit of Edwin H. Park, which is in words and figures as shown by the copy thereof incorporated herein and designated by the letter "C"; and the said complainants also filed herein, in opposition to said motion,

the affidavit of F. G. Moffat, which is in words and figures as shown by the copy thereof incorporated herein and designated by the letter "D."

67 That thereafter, and in further support of said motion, the said moving defendants filed herein an additional affidavit made by said Anderson, Van Cise and Fellows, which additional affidavit is in words and figures as shown by the copy thereof incorporated herein and designated by the letter "E."

That the said motion and the said affidavit, hereinbefore referred to and designated by the letters "A", "B", "C", "D", and "E", respectively, are in words and figures as follows to-wit:

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the Circuit Court of the United States Within and for said District.

CLARA A. WHEELER et al., Complainants,
versus
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Motion to Dismiss.*

Come now the defendants Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver, and in their own proper persons as defendants in the above entitled cause, and respectfully petition and move this Honorable Court to dismiss the said cause under the provisions of section 5 of the act of

68 March 3rd, 1875, Chapter 137, 18th Statutes, 472, because they say this Honorable Court has no jurisdiction of said cause, in that the same does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, and that the parties complainant to said cause have been improperly and collusively made or joined for the purpose of attempting to create a cause cognizable under the laws of the United States and jurisdiction of this Honorable Court.

And in support of this petition and motion the said defendants file herewith the affidavit of Edwin Van Cise, one of your petitioners, and pray that the same may be considered as a part and parcel hereof.

The above named defendants also respectfully petition and move this Honorable Court to dismiss said cause at the costs of the said complainants to be taxed.

(Signed) CHARLES S. THOMAS,
CHARLES W. WATERMAN,
J. H. GABRIEL,
*Defendants.*

WM. H. BRYANT,
GEO. L. NYE,
WM. P. MALBURN,
WM. A. JACKSON,
*Of Counsel.*

69 B.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the Circuit Court of the United States within and for said District.

CLARA A. WHEELER et al., Complainants,
versus
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Affidavit in Support of Motion to Dismiss.*

STATE OF COLORADO,
*City and County of Denver, ss:*

Edwin Van Cise being first duly sworn according to law deposes and says:

That he is a member of the Public Utilities Commission of said City and County of Denver, and one of the defendants in the above entitled cause.

That he is informed and believes the complainant Frank A. Lusk is a resident and citizen of the city of Missoula and state of Montana, and the complainant Clara A. Wheeler is a resident and citizen of the city of Goldfield and state of Nevada, and were respectively such citizens and residents at and before the time of the institution of this suit.

That the said Frank S. Lusk was a former resident and citizen of Colorado, and was and is a close personal friend of Mr. F.
70 G. Moffat of the City and County of Denver aforesaid, and a gentleman who is interested as a stockholder, or bondholder, or both, or in some other capacity in the Denver Union Water Company of said City and County of Denver, the said Clara A. Wheeler being a client of Edwin H. Park, Esquire, solicitor for the complainants in this cause.

That on or about the 19th or 20th day of June, 1911, the said Moffat by the authority or consent of the Denver Union Water Company, signed and sent to the said Lusk a telegram of which the following is a copy:

Frank S. Lusk, First National Bank, Missoula, Mont.:

Would you be willing as a non-resident taxpayer to bring suit in Federal Court to stop illegal expenditure of public moneys by Utilities Commission if protected by Water Company on expenses and all liabilities? If so, wire me authority in your name to engage attorney and bring suit.

(Signed) F. G. MOFFAT.

That on or about the 20th day of June of said year the said Lusk signed and forwarded a telegraphic answer to said Moffat in words and figures following:

MISSOULA, MONT., 6/20–11.

F. G. Moffat, Denver, Colo.:

Please engage necessary counsel and take proper steps to protect against illegal expenditures by Utilities Commission. Am owner of four lots corner Ninth and Sherman, and I object to the pro-
71 posed expenditures.

(Signed) FRANK S. LUSK.

The affiant further states on information and belief that upon receipt of said telegram the said Moffat, or someone acting for him and for said Denver Union Water Company retained and employed Edwin H. Park, Esquire, in the name of said Lusk, but really for said Water Company, to prepare and file, or to file the bill in this cause; but upon consultation it was discovered that the amount in controversy in said cause with said Lusk as sole complainant was insufficient to confer jurisdiction upon this court; so that it became necessary to procure some other non-resident owning taxable property in said City and County of Denver to join with said Lusk in filing said bill. That the said Park was thereupon authorized to confer with his client the said Clara A. Wheeler with a view of securing her cooperation with the said Lusk as a party complainant to said bill, she to be also guaranteed against all expense in consideration of the use of her name as such complainant. That thereupon and on the 21st day of June aforesaid the said Park signed and sent a telegram to the said Wheeler in words and figures following:

DENVER, COLO., *June* 21, 1911.

Clara A. Wheeler, Goldfield Hotel, Goldfield, Nevada.:

Will you permit use of your name in suit here to restrain
72 mis-use of taxes by city officials. If so, wire me at once authorizing me to bring such suit. I advise the bringing if the suit, and will protect you against expenses.

(Signed) EDWIN H. PARK.

That on the same day the said Wheeler answered by telegram in words and figures following:

GOLDFIELD, NEVADA, *June* 21, 1911.

Edwin H. Park, E. & C. Bldg., Denver, Colo.:

Yes. Use your judgment in the matter.

(Signed) CLARA A. WHEELER.

That the said bill of complaint had been already prepared on said 21st day of June, and was filed on the 21st day of June, 1911, and on the next day the said Park wrote and mailed a letter to the said Wheeler in words and figures following:

DENVER, COLO., *June* 22, 1911.

Mrs. Clara A. Wheeler, Goldfield Hotel, Goldfield, Nevada.

MY DEAR MRS. WHEELER: On yesterday I wired you for permission to bring a suit in your name against some of the city officials for

misuse of taxes, and received your reply authorizing me to go ahead. I brought the suit and filed it on yesterday. The suit is to restrain the Water Commissioners of Denver from further expenditures looking toward the purchase of a water plant by the City of Denver. The city is already enjoined in another proceeding in which the Water Company was a party. Since that time the Water Commission has spent $31,000. to hold an election, and about $25,000. for other purposes; and are seeking to compel the city to pay out on
73 warrants about $20,000. more.

The courts have already held that the amendment to the charter establishing a Water Commission for the purpose of purchasing or building a water plant is unconstitutional and void, and it is our purpose to stop the spending of any more of the people's money in that direction.

I desire to bring suit in the Federal Court, and therefore had to get permission of a non-resident taxpayer to bring suit, which accounts for my telegraphing you for permission.

You will not be charged with any expense or costs in the matter, either for court costs or attorneys' fees; and I will see that you are absolutely protected in every way from any liability whatever. Thanking you for your permission to bring the suit in your name, I remain,

—— ——.

Affiant further states on information and belief that copies of said telegrams and letter were voluntarily furnished to Charles S. Thomas, Esquire, one of affiant's solicitors, on Thursday the 26th day of October, 1911, and by the said Thomas read to affiant on Friday the 27th inst.

Affiant further says that the facts by him hereinabove set forth clearly indicate that the parties to the said bill were improperly and collusively joined as complainants for the purpose of creating a suit cognizable in this Honorable Court, in the interest, for the benefit and at the cost of the Denver Union Water Company, neither of the said parties complainant having any knowledge of a joinder with the other, or of any connection of the other with the suit or controversy; and having no interest therein which was
74 so imperilled as to cause them to proceed on their own motion and at their own expense. That each was solicited for the use of his and her name, by reason whereof the said bill so improperly and collusively framed and filed is devoid of equity and should be dismissed at complainant's cost.

And further affiant saith not.

(Signed) EDWIN VAN CISE.

Subscribed and sworn to before me this 28″ day of October, A. D. 1911. My commission expires Feb. 25″, 1915.

(Signed) PATTIE DENNIE,
*Notary Public.*

[L. S.]

C.

In the Circuit Court of the United States for the District of Colorado.

CLARA A. WHEELER et al., Complainants,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

*Affidavit of Edwin H. Park.*

STATE OF COLORADO,
*City and County of Denver, ss:*

Edwin H. Park, being first duly sworn, on his oath deposes and says:

That he is the solicitor for the complainants in the above entitled cause; that on June 21, 1911, the question of bringing a taxpayers' suit against the so-called Public Utilities Commission was
75 brought to the attention of affiant by Mr. Gerald Hughes, and affiant was asked whether he would be willing to bring such a suit for and on behalf of Frank S. Lusk; that Mr. F. G. Moffat had received a telegram from said Lusk authorizing the said Moffat to retain counsel in his behalf for the purpose of bringing a suit in the Federal Court to restrain the further expenditure of public moneys by said so-called Public Utilities Commission; that affiant accepted the employment.

Affiant further states that the complainant Clara A. Wheeler then owned, and still does own, a large amount of property within the City and County of Denver, which would be subject to taxation for all expenditures made by the so-called Public Utilities Commission and the bonds proposed to be issued by said Commission; that affiant had been the legal adviser of said Clara A. Wheeler for some time prior to said June 21, 1911, and affiant suggested to Mr. Hughes the advisability of joining the said Clara A. Wheeler as a party complainant in said cause, so that she might receive the same protection and the same benefit in the said suit as the said Lusk, provided the said Clara A. Wheeler was protected as against costs and counsel fees in the said cause; that affiant, as counsel for the said Clara A. Wheeler, then and there believed it to be to the interest of
76 the said Clara A. Wheeler so to join in said suit as party complainant, provided she were protected in the manner aforesaid; thereupon affiant sent a telegram to the said Clara A. Wheeler, a copy of which said telegram is set out in the affidavit of the respondent Van Cise, and the reply received by affiant authorized him to join as a party complainant in said suit the said Clara A. Wheeler, said reply being in words and figures as set out in the said Van Cise's affidavit. Thereupon affiant brought said action, naming as parties complainant therein both the said Clara A. Wheeler and the said Frank S. Lusk, and bringing the same on their behalf specifically as taxpayers of said City and County of Denver, and also on

behalf of all other taxpayers similarly situated, as appears from the bill of complaint herein.

Affiant further states that the property described in paragraph 15 of the bill of complaint herein as being the property of the said Frank S. Lusk had been owned by him for a number of years prior to the bringing of this action, and that the property described in said paragraph of said bill as being the property of the said Clara A. Wheeler, with the exception of Lot 4 and the south half of lots 3, block 14, Amended Map of St. James Heights, had been inherited by her from her father, John Milheim, prior to the first day of May, 1910,
77 and continuously owned by her since that date; that as to said property in block 14, amended map of St. James Heights, the same had been purchased by her about the month of May, 1911, as an investment, the said purchase being made with her own funds, and the said property being then and there acquired and ever since held as her own individual property; and affiant further says, on information and belief, that the said Clara A. Wheeler is now, and for several years has been, the owner of other real estate in the City and County of Denver, and subject to taxation therein, having a value of not less than ten thousand dollars.

Affiant further says that said property, owned by the said Lusk and the said Wheeler, respectively, has been owned by them continuously from the respective dates of its acquisition down to the present time, and that the said Clara A. Wheeler is neither a stockholder nor a bondholder, or otherwise financially interested in The Denver Union Water Company.

Affiant further says that it is not true, as stated in the affidavit of the said Van Cise, that the said Clara A. Wheeler was joined as a complainant in said bill at the solicitation or request of The Denver Union Water Company; but that, on the contrary, affiant himself suggested the joinder of the said Clara A. Wheeler, because in his opinion, as her attorney, it was to her interest so to be joined,
78 in order that her property situated and subject to taxation in the City and County of Denver, might be protected against charges and threatened charges which appeared to be illegal and improper, and affiant, as her said attorney, desired that she should be so joined, and recommended to her that she should so join, provided that she might be protected against costs and attorney's fees incurred in said litigation, that in the opinion of affiant, as legal adviser to the said Clara A. Wheeler, it was and is desirable that she should be by name a party complainant in this suit, in order that her interests as a property owner and taxpayer be fully protected, and he so advised his said client, and she accepted said advice and authorized him to act in accordance therewith, as appears from the correspondence set forth in the affidavit of the said Van Cise filed herein.

Affiant further says that at and for a long time prior to said June 21, 1911, he was and had been acting as attorney and legal adviser to the said Clara A. Wheeler in reference to matters in the City and County of Denver in which she was interested, and particularly in reference to said property inherited by her upon the death of her said father, John Milheim.

Affiant further says that it is not true, as charged in the affidavit of said Van Cise, that this suit is one brought solely in the interest or for the benefit of The Denver Union Water Company, but
79 that said suit is brought in the interest and for the benefit not only of the property owners and taxpayers specifically named therein as complainants, but also, as appears from the bill of complaint, for and on behalf of, and in the interest and for the benefit of all other property owners and taxpayers similarly situated, including The Denver Union Water Company; that The Denver Union Water Company, as affiant is informed and believes, is a very large property owner and taxpayer in the City and County of Denver, and has been such for several years, its property, as affiant is informed and believes, within the City and County of Denver being assessed for taxation at approximately two million, five hundred thousand dollars, being approximately two per cent. of the total assessed valuation of all property within said City and County, and that, as affiant is informed and believes, said Water Company, by reason of its large interest as a property owner and taxpayer, was willing to and did undertake to protect the said Clara A. Wheeler and the said Frank S. Lusk, the complainants named herein, from attorney's fees and costs of suit.

Affiant further says, upon the facts hereinabove set forth, that it is not true, as stated in the affidavit of the said Van Cise, that the parties complainant to said bill were improperly or collusively joined, nor was the same done for the purpose of creating a suit cog-
80 nizable in this court; but that, on the contrary, a justiciable controversy did and does exist between the complainants, and each of them, and said defendants, which it is to the interest of said complainants to prosecute; that it is not true, as stated in said affidavit, that said suit was brought in the interest or for the benefit of The Denver Union Water Company, except as said The Denver Union Water Company was one of the many property owners and taxpayers in said City and County of Denver; and that while it may be true that neither the said Frank S. Lusk nor the said Clara A. Wheeler, nor the two jointly, would have commenced or prosecuted said suit solely at their own expense, nevertheless it is not true, as charged in said affidavit of said Van Cise, that the said Lusk and the said Clara A. Wheeler, or either thereof, have no interest therein which they desire to have prosecuted or no rights which they desire to have protected; but, on the contrary, each of them at all the times above mentioned have had, and now have, the interests as taxpayers and property owners described in the bill of complaint herein, and both in good faith desire that their said interests should be protected by the continued prosecution of said suit, in the manner and under the circumstances hereinabove described.

And further affiant saith not.

(Signed) EDWIN H. PARK.

Subscribed and sworn to before me this 30" day of October,
81 A. D. 1911. My commission expires August 10, 1915.

(Signed) JOHN W. GRAHAM, JR.,
[L. S.] *Notary Public.*

D.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the United States Circuit Court of the Eighth Judicial Circuit in for the District of Colorado.

In Equity. No. —.

CLARA A. WHEELER and FRANK S. LUSK, Who Sue on Behalf of Themselves and All Other Taxpayers, etc., Complainants,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation of the State of Colorado; Albion K. Vickery, as Auditor of said City and County of Denver; Lewis C. Greenlee, as Treasurer of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, Claiming to Be and Assuming to Act as Members of and Constituting an Alleged Pretended Body Called the Public Utilities Commission of said City and County of Denver, Defendants.

*Affidavit of F. G. Moffat.*

STATE OF COLORADO,
*City and County of Denver, ss:*

F. G. Moffat, of lawful age, being first duly sworn, on his oath, deposes and says:

82 That he is now, was on the 19th day of June, 1911, and for sometime prior thereto had been the Treasurer of The Denver Union Water Company; that on the — day of May, A. D. 1911, the Circuit Court of Appeals of the Eighth Circuit rendered an opinion in the case of New York Trust Company vs. The City and County of Denver, et al., No. 5572, in and by which opinion and decision Section 264-*a* of the Charter of the City and County of Denver was declared unconstitutional and invalid; that The Denver Union Water Company was a party to the above mentioned suit and had alleged in a cross bill filed in the suit, that it was, and it is, was, and for many years last past had been a large tax-payer in the City and County of Denver, its property being assessed at two million five hundred thousand ($2,500,000.00) dollars, and it paying approximately one-fiftieth (1/50) of all the taxes assessed and collected in the City and County of Denver. That notwithstanding said opinion and decision of the Circuit Court of Appeals, the Public Utilities Commission of the City and County of Denver, and Mr. Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of said Commission, openly and publicly declared their purpose of ignoring said decision and continuing to illegally and without warrant disburse and spend the public funds

and collected taxes of the City and County of Denver, including the proportion thereof paid by The Denver Union Water Company as a taxpayer. The said Public Utilities Commission and the members thereof openly, and in the public press, announced their purpose of instituting other and independent litigation in the state courts for the purpose of raising the same and identical questions as were raised and decided in the case above referred to in the circuit court of appeals. The result of the threats of said Public Utilities Commission, and the members thereof, was not only to illegally spend the funds and money of the tax-payers of the City and County of Denver, but thus illegally to expend the taxes paid by The Denver Union Water Company in carrying on the litigation against the said Company, and likewise harrassing said Company regardless of the decision of the circuit court of apptals.

Many tax-payers, both citizens of the state of Colorado and citizens of other states, had complained to the officers of The Denver Union Water Company of such attempt to illegally expend the public funds, and had requested the officers of The Denver Union Water Company to take some proper and legal step to stop such unwarranted action by the Public Utilities Commission.

On or about the 19th day of June, 1911, the conditions above stated were the subject of discussion between affiant and Gerald Hughes, counsel for The Denver Union Water Company, and at such conference Mr. Hughes stated that he considered it advisable that the litigation in all its phases should remain in the Federal Courts where the controversy had arisen and where a decision had already been rendered upon the merits of the controversy and where this litigation could be continued to its end free from local prejudice or influence or the attacks of local newspapers inimical to the interests of The Denver Union Water Company. That thereupon your affiant suggested that Mr. Frank S. Lusk, who was a resident and citizen of the state of Montana, and who had formerly been a resident of the City and County of Denver and who was a personal friend of affiant's and knew of the conditions surrounding the litigation between The Denver Union Water Company and the City and County of Denver, might have sufficient interest and be willing to institute such other and additional suits in the Federal Court as might be necessary and proper to prevent the further illegal and unwarranted expenditure of public funds affecting not only said Lusk and other individuals tax-payers, but to a large extent The Denver Union Water Company as a tax-payer. Thereupon, and with the consent and advice of Gerald Hughes, your affiant sent to said Lusk the telegram set forth in the affidavit of Edwin Van Cise heretofore filed in support of the motion to dismiss, and thereafter received the reply also set out in said affidavit of said Van Cise.

That thereafter your affiant, through Gerald Hughes, employed Edwin H. Park to institute on behalf of said Frank S. Lusk and the other tax-payers of the City and County of Denver similarly situated, and who desired to become parties to said suit,

such proper and appropriate suits in the Federal Court as might be necessary to further prevent the illegal and unwarranted expenditure of public funds by the Public Utilities Commission and its members, contrary to the opinion and decision of the Circuit Court of Appeals previously rendered.

Your affiant further states that although he had informed said Lusk that The Denver Union Water Company would protect him in regard to expenses, he did not so inform said Park, and that said Park did not, at that time, nor until sometime subsequent thereto, know of the exchange of telegrams between himself and said Lusk.

Your affiant further states that said Frank S. Lusk is now, was on the 22nd day of June, 1911, and also on and prior to May 1st, 1910, the owner and in the possession of lots thirty-one (31) to thirty-four (34) inclusive, block nine (9) of the First Addition to Arlington Heights, City and County of Denver, had been assessed thereon and paid the taxes thereon; that said property is assessed
86 at the sum of forty-two hundred ($4200.00) dollars which, as affiant is informed and believes, is upon a one-third (1/3) basis of its actual value.

Your affiant further states that said Frank S. Lusk and The Denver Union Water Company are now and were at the times herein mentioned, both tax-payers of the City and County of Denver, having a common interest in the illegal and unwarranted expenditure of public funds by the Public Utilities Commission.

Your affiant further states that with the consent and approval of said Frank S. Lusk this suit was begun on his behalf, that he is now and has at all times been one of the parties in interest as a tax-payer of the City and County of Denver, and that he at all times desired and does now desire to continue said litigation, and in a legal and proper manner to stop, if possible, the further illegal expenditure of public funds, a portion of which are contributed by himself.

Your affiant further states that said Frank S. Lusk is not now, was not on the 22nd day of June, 1911, nor at any time prior thereto, a stockholder or a bondholder of The Denver Union Water Company, and that he has no further or other interest in this suit than as a tax-payer.

Your affiant further states that as a tax-payer of the City and County of Denver, The Denver Union Water Company is interested in said litigation, and as your affiant is informed and believes,
87 and so charges the fact to be, has a right not only to maintain its rights as a tax-payer, but if it sees fit so to do, to join with the complainants in this suit as a nominal party to the litigation.

Further affiant saith not.

(Signed) F. G. MOFFAT.

Subscribed and sworn to before me this 30th day of October, A. D. 1911. My commission will expire October 31st, 1914.

[L. S.] (Signed) WALTER E. WILMOT,
*Notary Public.*

E.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the Circuit Court of the United States for the Eighth Judicial Circuit in and for said District.

In Chancery.

CLARA A. WHEELER et al., Complainants,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

STATE OF COLORADO,
*City and County of Denver, ss:*

Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, of lawful age, being first duly sworn, on their several oaths, each
88 for himself and not one for the other, depose and say.

That the affidavit of F. G. Moffat, filed in this Honorable Court on the 31st day of October, A. D. 1911, in opposition to motion to dismiss the above entitled cause, among other things alleges:

That notwithstanding the said opinion and decision of the circuit court of the United States, the Public Utilities Commission of the City and County of Denver, and Mr. Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of said Commission, openly and publicly declare their purpose of ignoring said decision and continuing to illegally and without warrant disburse and spend the public funds and collected taxes of the City and County of Denver, including the proportion thereof paid by The Denver Union Water Company as a taxpayer. The said Public Utilities Commission, and the members thereof, openly and in the public press announce their purpose to institute other and independent litigation in the state courts for the purpose of raising the same and identical questions which were raised and decided in the case above referred to in the circuit court of appeals. The result of said threats of said Public Utilities Commission, and the members thereof, was not only to illegally spend the moneys of the taxpayers of the City and County of Denver, but thus illegally to expend the taxes paid by The Denver Union Water Company in carrying on the litigation against the said Company, and likewise harass said Company, regardless of the decision of the circuit court of appeals.

These affiants say that they have not, nor has either of them, at any time or place, either openly and publicly, or privately
89 and secretly, declared any such purpose as charged against them in said affidavit. Nor have they at any time done, or assumed to do, anything which might be construed as a violation and disregard of the injunction of this Honorable Court since the said writ of injunction was issued. That the said cause referred to in the said affidavit of Mr. Moffat, to-wit, The New York Trust Company vs. The City and County of Denver et al., No. 5572, on the records

of this court, involves, as they have been advised and as they believe, the controversy and therefore the issues sought to be presented and raised in the bill of the complainants in the above entitled cause, and in conferences with their counsel were advised that in the event they should be compelled to make answer thereto would so answer, and that the injunction issued as aforesaid in said prior cause virtually and in effect covered the identical things sought to be secured by the above named complainants, except in so far as the expenses incurred in litigating both said controversies, and in carrying out and performing the duties of said Public Utilities Commission was concerned.

That after the decision of the Honorable Circuit Court of Appeals, affirming the action of this Honorable Court, was announced, these affiants consulted their counsel in order to ascertain whether
90 the drawing of warrants for their salaries and for the necessary expenses incurred and to be incurred in said litigation, and absolutely unavoidable in the defense thereof, could be construed as a violation of the injunction of this Honorable Court in any particular, and only issued their requisitions or warrants upon the assurance of counsel that in their opinion they were not prohibited from so doing. They also readily acquiesced in the action of the Auditor and Treasurer of the City of Denver in requesting an opinion of the Honorable City Attorney as to their official status, after which they issued three certificates with a view of testing their right and authority so to do in the state courts, and in so doing were advised by their counsel aforesaid that they were not in any manner transgressing the mandate of this Honorable Court in the said cause No. 5572.

These affiants further aver that they have intended to institute litigation in the state courts not for the purpose of raising any question raised or decided in this Honorable Court, or of which this Honorable Court has jurisdiction, but merely in the discharge of their duties as the Public Utilities Commission, with a view of recovering certain moneys believed to be due from certain collectors of water rent in the town of Globeville from the inhabitants of Globeville, and which should be paid to said Commission
91 under the charter of said City and County of Denver and such kindred matters as might from time to time arise in the discharge of their duties aforesaid.

And further affiants say not.

(Signed) ARMOUR C. ANDERSON.
" EDWIN VAN CISE.
" A. LINCOLN FELLOWS.

Subscribed and sworn to before me this 31" day of October A. D. 1911.

My commission expires February 25, 1915.

[L. S.] (Signed) PATTIE DENNE,
*Notary Public.*

I do further certify that said motion to dismiss was, on the 31st day of October, A. D. 1911, presented to the court, and supported

and opposed by the affidavits hereinbefore incorporated and designated "B", "C", "D", and "E", respectively; and upon consideration of said motion and said affidavits, and no other proof, evidence or showing whatsoever, the court did then and there grant said motion to dismiss, and did then and there enter an order and decree of dismissal, based solely, only and exclusively upon the court's
92 decision, then and there made and announced, that the circuit court of the United States for the district of Colorado was without jurisdiction as a Federal Court to entertain said suit.

And forasmuch as the foregoing matters and things may not otherwise fully appear of record herein, and to the end that the same may so appear of record, in order that they may be considered by the Supreme Court of the United States, on appeal thereto for the review of said decision upon the question of jurisdiction, this certificate in the nature of a bill of exceptions is this day signed, sealed, filed and made a part of the record herein.

This certificate is made at the same term of court during which the transactions hereinabove recited took place.

Dated this 1st day of November, A. D. 1911.

ROBT. E. LEWIS, [SEAL.]
*District Judge.*

(Endorsed:) 5707. U. S. Circuit Court. District of Colorado. Clara A. Wheeler et al. vs. The City and County of Denver et al. Certificate in the nature of a bill of exceptions. Filed Nov. 1, 1911, Charles W. Bishop, Clerk.

93 THE UNITED STATES OF AMERICA,
*District of Colorado:*

Know All Men by these Presents, That we, Clara A. Wheeler, Frank S. Lusk, and National Surety Company, are held and firmly bound unto city and county of Denver, Albion K. Vickery, Auditor, Lewis C. Greenlee, Treasurer, Edwin Van Cise, Armour C. Anderson and A. Lincoln Fellows, in the full and just sum of five hundred dollars, to be paid to the said City and County of Denver, Albion K. Vickers, Auditor, and Lewis C. Greenlee, Treasurer, and Edwin Van Cise and A. Lincoln Fellows and Armour C. Anderson, their successors, heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this first day of November in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately, at the May Term, A. D. 1911, of the circuit court of the United States, for the district of Colorado, sitting at Denver, in a suit pending in said court between Clara A. Wheeler and Frank S. Lusk, complainants, and The City and County of Denver, Albion K. Vickery, Auditor, Lewis C. Greenlee, Treasurer, Edwin Van Cise, Armour Anderson and A. Lincoln Fellows, respondents, judgment was rendered against the said Clara A. Wheeler and Frank
94 S. Lusk, and the said Clara A. Wheeler and Frank S. Lusk having prayed and been allowed an appeal to the United States

Supreme Court to reverse the judgment in the aforesaid suit;e and a citation directed to the said city and county of Denver, Albion K. Vickery, Auditor, Lewis C. Greenlee, Treasurer, Edwin Van Cise, Armour Anderson, and A. Lincoln Fellows, citing and admonishing them to be and appear in the United States Supreme Court at the city of Washington D. C. thirty days from and after the date of said citation;

Now the condition of the above obligation is such, that if the said Clara A. Wheeler and Frank S. Lusk shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Saled and delivered in presence of

CLARA A. WHEELER, [SEAL.]
By EDWIN H. PARK,
*Her Solicitor.*
FRANK S. LUSK, [SEAL.]
By EDWIN H. PARK,
*His Solicitor.* [SEAL.]

[Corporate Seal National Surety Company.]

NATIONAL SURETY COMPANY,
By C. H. TONCRAY,
*Attorney in Fact.*

Approved:
ROBT. E. LEWIS, *Dist. Judge.*

(Endorsed:) No. 5707. United States Circuit Court, Dis-
95 trict of Colorado. Clara A. Wheeler et al. vs. City and County of Denver et al. Bond on Appeal $500.00. Filed Nov. 1, 1911. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

In the Circuit Court of the United States for the District of Colorado.

No. 5707.

CLARA A. WHEELER et al.
versus.
CITY AND COUNTY OF DENVER et al.

The clerk will make copy in the above entitled cause for supreme court, bill of complaint, demurrer, motion to dismiss, certificate in nature bill of exceptions, certificate jurisdictional question, assignment errors, prayer for appeal, bond.

EDWIN H. PARK,
*Solicitor for Pl'ffs.*

To Charles W. Bishop, Clerk.
Denver, Colorado, 11/1/11.

(Endorsed:) No. 5707. United States Circuit Court, For the district of Colorado. Clara A. Wheeler et al. Versus The City and County of Denver et al. Præcipe for Transcript of Record. Filed Nov. 1, 1911, Charles W. Bishop, Clerk. Edwin H. Park, Attorney for complainants.

96 *Citation on Appeal, U. S. Circuit Court of Appeals.*

UNITED STATES OF AMERICA,
*Eight- Judicial Circuit, ss:*

In the United States Circuit Court of Appeals for the Eight- Judicial Circuit.

THE UNITED STATES OF AMERICA:

To City and County of Denver, Albion K. Vickery, Auditor; Lewis C. Greenlee, Treasurer; Edwin Van Cise, Armour C. Anderson, and A. Lincoln Fellows, Greeting:

You are hereby cited and admonished to be and appear in The United States Supreme Court at the city of Washington, D. C. thirty days from and after the day this citation bears date, pursuant to an appeal allowed by The Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein Clara A. Wheeler and Frank S. Lusk — appellants and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Robert E. Lewis, Judge of the district court of the United States for the district of Colorado and ex officio Judge of the circuit court of the United States for the district of Colorado, at Denver, in said district, this 1st day of November A. D. 1911.

ROBERT E. LEWIS, *Judge.*

97 *Proof of Service.*

THE UNITED STATES OF AMERICA,
*District of Colorado, ss:*

On this — day of ——, A. D. 191-, personally appeared —— ——, before me, the subscriber, clerk of the circuit court of the United States, for the district of Colorado, and makes oath that he delivered a true copy of the within citation to ——

—— ——.

Service accepted this Nov. 1st, 1911.

G. O. RICHMOND,
*Att'y for City of Denver, A. K. Vickery and L. C. Greenlee.*

Subscribed and sworn to before me this — day of ——, A. D. 191-.

——— ———, *Clerk.*
——— ———, *Deputy Clerk.*

Service of the within citation is hereby accepted for and on behalf of ——

Service accepted this 1st day of November A. D. 1911.

C. S. THOMAS,
*Sol'r for Anderson, Van Cise & Fellows.*

[Endorsed:] No. 5707. United States Circuit Court of Appeals, Eighth Circuit. Clara A. Wheeler et al. vs. City and County of Denver et al. Citation. Filed Nov. 1, 1911 By Charles W. Bishop, Clerk. Edwin H. Park, Solicitor for appellants.

98 5707.

UNITED STATES OF AMERICA,
*District of Colorado, ss:*

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to ninety-five (95), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings, and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe, heretofore filed or entered of record in said court and in a certain cause lately in said court pending wherein Clara A. Wheeler and Frank S. Lusk, who sue on behalf of themselves and all other taxpayers similarly situated, are complainants, and The City and County of Denver, Albion K. Vickery, as Auditor of said City and County of Denver; Lewis C. Greenlee, as Treasurer of said city and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claiming to be and assuming to act as members of and constituting an alleged pretended body called the Public Utilities Commission of said City and County of Denver, are respondents, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this twenty-third day of November, A. D. 1911.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Endorsed on cover: File No. 22,944. Colorado, C. C. U. S. Term No. 473. Clara A. Wheeler and Frank S. Lusk, appellants, vs. City and County of Denver, Albion K. Vickery, auditor; Lewis C. Greenlee, treasurer, et al. Filed November 28, 1911. File No. 22,944.

NO. 473

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

OCTOBER TERM, 1912.

CLARA A. WHEELER AND FRANK S. LUSK, who sue on behalf of themselves and all other tax payers, etc.,

*Appellants,*

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation of the State of Colorado; ALBION K. VICKERY, as Auditor of said City and County; LEWIS C. GREENLEE, as Treasurer of said City and County; ARMOUR C. ANDERSON, EDWIN VANCE and A. LINCOLN FELLOWS, claiming to be and assuming to act as members of and constituting an alleged pretended body called The Public Utilities Commission of said City and County of Denver,

*Appellees.*



*Appeal from the Circuit Court, District of Colorado.*

NOTICE OF MOTION, MOTION TO ADVANCE, STATEMENT OF FACTS, AND BRIEF AND ARGUMENT ON THE MERITS.

EDWIN H. PARK,
*Solicitor for Appellants.*

BISHOP PUBLISHING CO.

## SUBJECT INDEX.

## CASE INDEX.

# NO. 473

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

OCTOBER TERM, 1912.

CLARA A. WHEELER AND FRANK S. LUSK, who sue on behalf of themselves and all other tax payers, etc.,

*Appellants,*

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation of the State of Colorado; ALBION K. VICKERY, as Auditor of said City and County; LEWIS C. GREENLEE, as Treasurer of said City and County; ARMOUR C. ANDERSON, EDWIN VANCISE and A. LINCOLN FELLOWS. claiming to be and assuming to act as members of and constituting an alleged pretended body called The Public Utilities Commission of said City and County of Denver,

*Appellees.*

*Notice of motion to advance the Case in accordance with Rule 32 of said Court.*

*To Charles S. Thomas, Charles W. Waterman, J. H. Gabriel, William H. Bryant, George L. Nye, William P. Malburn and William A. Jackson, Solicitors for Appellees:*

You will please take notice that on Monday, the 11" day of Nov, A. D. 1912, or at the next sitting of the court thereafter, at the opening of the court on that day, the above named appellants will present to the Supreme Court of the United States, at the Capitol, in the City of Washington, D. C., their motion to advance this case upon the docket of said court in accordance with rule 32 thereof, a copy of which said motion, and brief upon the merits, are hereto attached.

At which time and place you may attend if you think proper.

EDWIN H. PARK,
*Solicitor for Appellants.*

Received a copy of the above notice, this ——— day of ————, A. D. 1912.

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*Solicitors for Appellees.*

# NO. 473

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

OCTOBER TERM, 1912.

CLARA A. WHEELER AND FRANK S. LUSK, who sue on behalf of themselves and all other tax payers, etc.,

*Appellants,*

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation of the State of Colorado; ALBION K. VICKERY, as Auditor of said City and County; LEWIS C. GREENLEE, as Treasurer of said City and County; ARMOUR C. ANDERSON, EDWIN VANCISE and A. LINCOLN FELLOWS. claiming to be and assuming to act as members of and constituting an alleged pretended body called The Public Utilities Commission of said City and County of Denver,

*Appellees.*

*Motion to Advance.*

On June 21st, 1911, appellants filed in the Circuit Court of the United States of the Eighth Judicial Circuit within and for the District of Colorado, their bill of complaint for an injunction, for an accounting and for the purpose of declaring certain amendments to the charter of the City and County of Denver unconstitutional, null and void, and for general relief.

That thereafter the appellees filed a motion to dismiss the cause of action, upon the alleged reason that it did not substantially involve a dispute or controversy properly within the jurisdiction of the court, in this, that the cause was collusively brought, basing the motion upon affidavits setting forth certain correspondence by letter and telegram between the appellants and counsel with respect to the bringing of the suit.

Upon the hearing the motion was sustained and the cause dismissed.

Thereupon the matter was removed to this court upon certificate of jurisdictional question, certified by the court below, to the effect that the question of jurisdiction was the only one involved at the hearing of said motion, and the only question determined by the court was the question of jurisdiction raised by said motion.

The appellants, under rule 32 of this court, now move the court to advance this cause on the docket in accordance with the provision of said rule and set it down for hearing on a day convenient to the court.

EDWIN H. PARK,
*Solicitor for Appellants.*

# NO. 473

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

OCTOBER TERM, 1912.

CLARA A. WHEELER AND FRANK S. LUSK, who sue on behalf of themselves and all other tax payers, etc.,

*Appellants,*

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation of the State of Colorado; ALBION K. VICKERY, as Auditor of said City and County; LEWIS C. GREENLEE, as Treasurer of said City and County; ARMOUR C. ANDERSON, EDWIN VANCISE and A. LINCOLN FELLOWS. claiming to be and assuming to act as members of and constituting an alleged pretended body called The Public Utilities Commission of said City and County of Denver,

*Appellees.*

*Appeal from the Circuit Court, District of Colorado.*

## STATEMENT OF FACTS AND BRIEF UPON THE MERITS.

The bill of complaint alleges the requisite citizenship of the parties and jurisdictional amount; that the appellant Wheeler had been, for more than one year prior to the filing of the bill, the owner of real estate in the City and County of Denver of an assessed valuation of approximately $35,000., and that the appellant Lusk was such owner of real estate in said city of the assessed valuation of $4,200; that the assessed valuation of all property within the City and County of Denver for the year preceding the filing of said suit was $135,467,050; that at a general city election held in May, 1910, it was claimed by the appellees that an amendment to the charter of the City of Denver was adopted by a majority of the qualified electors voting at said election, which said amendment provided for the acquisition, by purchase or otherwise, by the City of Denver of a water-works system; provided for a Public Utilities Commission, to have charge and control of such water-works; named the persons who were to constitute such Commission, their terms of office, salaries, defined their duties, authorized them to issue bonds to the extent of $8,000,000 for the construction or purchase of such water-works system, and other duties as in said amendment prescribed. (Record page 1-21.)

The appellants by their bill attacked the said amendment on various grounds, among which were that the same was not properly submitted to the voters of said city; that said alleged amendment

was void because it submitted to the electors divers questions in one, which, under the submission, could only be voted for as a whole and not separately or independently of each other; that the said amendment established the office of the Utilities Commission, and by the same act filled such offices; that said amendment not only violated the Federal Constitution but, also the Constitution of the State of Colorado, for the reasons stated and that in substance was not an amendment to the charter.

That another suit was pending in the Federal Court in which the United States Circuit Court of Appeals for the Eighth Judicial Circuit had sustained a temporary injunction theretofore granted by the Circuit Court for the District of Colorado, and in and by its order declared said section violated contractural rights of The Denver Union Water Company,—a contract then existing between said Company and the said City—but notwithstanding such injunction, and notwithstanding the said section had been declared unconstitutional, the said Commission was proceeding, under the terms of said section, to spend money of the taxpayers of the City of Denver.

That said bill was filed by the appellants as taxpayers of said City and County of Denver on behalf of themselves and all other taxpayers similarly situated, who might come in and join in said action.

Thereafter the appellees, Anderson, VanCise and Fellows, as members of said Public Utilities Commission, filed a motion to dismiss said cause,

because of the want of jurisdiction of the court, on the ground that the appellants had been improperly and collusively made or joined for the purpose of creating a cause cognizable under the laws of the United States and the jurisdiction of the Federal Court. In support of said motion affidavits were filed setting forth the correspondence between the appellant Lusk and F. G. Moffat, in which Moffat inquired of Lusk if he would be willing, as a non-resident taxpayer, to bring this suit if protected by the Water Company for his expenses and solicitors fees. Upon receipt thereof by Lusk he telegraphed Moffat to engage counsel and take the necessary steps. The affidavit also sets forth a telegram sent by the solicitor for the appellants to the appellant Wheeler, asking for authority to bring suit in her name in the Federal Court, her telegraphic response thereto and also a letter sent by the solicitor for the appellants to Mrs. Wheeler explaining the situation. Counter-affidavits were filed by the solicitor for the apellants and by F. G. Moffat, admitting the correspondence as above set forth, admitting that the expense of the litigation was being borne by The Denver Union Water Company, but that said Company was interested as a taxpayer; that the appellants had, for more than one year prior to the filing of said suit, been the owners of a large amount of taxable real estate within the City and County of Denver, and that the taxes assessed thereon for the payment of the bonds issued by said Commission would largely exceed the jurisdictional amount of the court; that neither of

the appellants was a stockholder nor a bondholder, nor in any manner financially interested in The Denver Union Water Company; that the appellant Wheeler was not joined as a complainant in said cause at the solicitation or request of The Denver Union Water Company, but on the request of her solicitor, who had been her counsel for a number of years prior thereto, and she was joined solely for the purpose of protecting her interests as a taxpayer in said City and County, and that it was solely for her protection that the solicitor recommended her to join in such suit, and upon her authority joined her as complainant therein; that said suit was not brought solely in the interest of The Denver Union Water Company, but was brought for the benefit of the appellants and other property owners and taxpayers of the said City and County; that The Denver Union Water Company was and is a large property owner in the said City and County, of an assessed valuation of approximately $2,500,000 and that because of its interest as such property owner was willing to and did undertake to protect the appellants from attorney fees and costs of suit; that said appellants were in no manner improperly or collusively joined, nor were they joined as appellants for the purpose of creating a suit cognizable in the Federal Court, but, as shown by the bill of complaint itself, a justiciable controversy did exist between the complainants, and each of them, and the respondents, which it was their interest to prosecute, and that the only interest of The Denver Union Water Company in said suit was that of a taxpayer,

and that while the appellants might not have brought said suit of their own motion, yet they have an interest therein and have rights which they desire to protect. (Record page 31-42.)

Upon the hearing of said motion it was sustained by the court and the cause dismissed. In consideration of said motion no other evidence or proof whatever was offered other than the affidavits so filed, and the decree of dismissal was based solely, only and exclusively upon the ground that the court was without jurisdiction to entertain said suit, because the same was collusively brought, the certificate of the District Judge to that effect being embodied in the record. (Record page 31).

## ARGUMENT.

Six errors are assigned upon this appeal. They are all to the effect that the court erred in holding that said suit was collusive and dismissing the same upon the showing made by the appellees.

The position assumed by the court below in dismissing this cause upon the affidavits filed, appears to have been based upon the proposition that a suit is collusive if it is brought by a party at the suggestion of others, notwithstanding there is a clear existing right in such party to bring and maintain the suit. In other words, if the suit had been brought voluntarily by the party it could be maintained, but if the suit had been at the suggestion of an attorney, then it was collusive, notwithstanding such litigant did have and was vested with a clear legal right to bring the suit.

It is not a crime and it does not constitute collusion, for another, who has rights to be protected, to agree to pay attorney fees and court costs, provided the party litigant is at the time vested with a justiciable controversy.

In this case both of the appellants were large property owners in the City and County of Denver, upon which they had paid taxes to the City and County of Denver, and which property was liable to be taxed to pay the interest and principal of the bonds issued by the Public Utilities Commission. It may be that neither of these appellants would have brought this suit of their own volition; they may not have brought this suit if they had been compelled to pay solicitors' fees and court costs out of their own funds.

But appellants were non-residents, were vested with a cause of action involving a sum in excess of the jurisdictional amount and properly invoked the jurisdiction of the Federal Court.

When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.

> Willcox v. Consolidated Gas Co., 212 U. S. 19, 40.
>
> Second Employers' Liability Cases, 223 U. S. 1, 58.

This court has repeatedly declared that it will not concern itself about the motives which actuated a litigant in bringing the suit, so long as the litigant was at the time of bringing the suit vested with a

justiciable controversy within the jurisdiction of a Federal Court. In other words, if a non-resident property owner is the owner of property of sufficient value, the tax upon which property to pay a bond issue will amount to a sum requisite to confer jurisdiction upon a Federal Court, it is immaterial, for the purpose of conferring jurisdiction, whether such property owner brings the suit of his own volition or does so upon the advice or request of another.

Blair v. Chicago, 201 U. S. 400, 448.

Chicago v. Mills, 204 U. S. 321, 325.

In re Metropolita Ry. Receivership, 208 U. S. 90, 107, 110.

In re Cleland, Petitioner, 218 U. S. 120, 123.

In *Blair v. Chicago, supra,* receivers had been appointed for some of the Street Railways of that city. Judgments had been obtained and assigned to Blair. The city contended that the suits wherein the receivers were appointed were collusive and a scheme concocted by the Street Railways and the Trust Company for the purpose of conferring jurisdiction upon the court. Mr. Justice Day, who wrote the opinion of the court, at page 448, said:

> "As to the conspiracy to get the case into the Federal Court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justiciable demand from seeking the Federal Courts for redress, if such be their choice of a forum in which to have

contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the Federal Courts, *and in such cases the motive of the creditor in seeking Federal Jurisdiction is immaterial.* South Dakota v. North Carolina, 192 U. S. 286, 310; Dickerman v. Northern Trust Company, 176 U. S. 181, 190; Lehigh Mining and Manufacturing Company v. Kelly, 160 U. S. 327, 336; Crawford v. Neal, 144 U. S. 585; Cheever v. Wilson, 9 Wall. 108, 123; Smith v. Kernochen, 7 How. 198, 216."

*In re Metropolitan Receivership, supra,* was an application for a madamus, commanding one of the circuit judges of the 2nd Circuit to dismiss a bill of complaint. Among other grounds alleged was that the suits were collusive, and for that reason the court below had no jurisdiction. Concerning this the court said, at page 110:

"It is asserted also, that there was collusion between the complainants and the street railway companies, on account of which the court had no jurisdiction to proceed, and therefore the suit should have been dismissed by the Circuit Court under Sec. 5 of the act of 1875, already cited. By that section it must appear to the satisfaction of the Circuit Court that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of that court, or that the parties

to that suit have been improperly or collusively made or joined for the purpose of creating a case cognizable under that act, in which case the Circuit Court is directed to proceed no further therein, but to dismiss the suit on that ground. Whether the suit involved a substantial controversy we have already discussed, and the only question which is left under that act is as to collusion.

In this case we can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but *there is no claim made that the averments in the bill were untrue, or that the debts, named in the bill as owing to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal Court. That the parties preferred to take the subject matter of the litigation into the Federal*

*Court, instead of proceeding in one of the courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal Court attached, the motive for bringing the suit there is unimportant.* Dickerman v. Northern Trust Co., 176 U. S. 181, 190; South Dakota v. North Carolina, 192 U. S. 286, 311; Blair v. City of Chicago, 201 U. S. 400, 448; Smithers v. Smith, 204 U. S. 632, 644."

*Chicago* v. *Mills, supra,* in order to get the controversy into a Federal Court, Mills, a large stockholder in the company, was requested to bring the suit. He retained his own counsel and brought suit in the Federal Courts. Objection was made that the suit was brought in the Federal Court by collusion between Mills and the Gas Company for the fraudulent purpose of invoking the jurisdiction of the Federal Court concerning a controversy which was really between the Gas Company and the City of Chicago. As a stockholder of the Company, Mills had a right to bring the suit; he was vested with a justiciable controversy, *and the fact that others contributed to the expense would not constitute collusion.* At page 330 the court said:

"When a citizen of one state has a cause of action against a citizen of another state which he may prosecute lawfully in a Federal Court, and when the suit is free from fraud or collusion, his motive in preferring a Feedral tribunal is immaterial.

Blair v. Chicago, 201 U. S. 400, 408, and previous cases in this court therein cited."

*In re Cleland, Petitioner, supra,* the same question was raised respecting a receivership case, where, in order to bring the suit in a Federal Court, stock of the defendant company was transferred to a non-resident prior to the bringing of the suit. It appears from the opinion of this court that Aldrich, who was the prior owner of the stock, was attorney for the company. The company was insolvent and the attorney desired to be appointed such receiver. He transferred the stock to his friend Bishop, who thereupon signed and swore to the bill. It was contended that Bishop was not a *bona fide* owner of the stock and that the proceeding was collusive. At page 123, Mr. Justice Holmes, who wrote the opinion of the court, said:

> "It is said that on the undisputed facts Bishop was not a *bona fide* shareholder, and that the proceeding was collusive. But the first proposition is not true and the second is not law. Bishop became the absolute owner of the shares in his name. The answer to the petition so finds, and there is no question about it. See South Dakota v. North Carolina, 192 U. S. 286, 310. Some of these shares have been issued to Aldrich in payment for services, others were issued by the corporation upon payment of ten dollars, the proper sum at the start. It is said that the corporation being insolvent the issue of the certificate was a fraud on

the other shareholders. No one complains here except the petitioner. It seems to have been to the advantage of all. Certainly it was not necessarily a fraud upon them. *As to collusion, there is nothing unlawful in transferring shares to a man out and out for the convenience of immediately beginning a suit that other shareholders have a right to begin, that all parties in interest want to have begun, and that the authorities of the opposing jurisdiction approve.*"

In the case at bar, at the time of filing the bill of complaint in the Federal Court each of the appellants was vested with a justiciable controversy. No question arises as to the transfer of property to invest them with such right to invoke the aid of the court, but they were already vested, and had been so vested, with such right years prior to the bringing of the case. The only question is the motive which actuated them, and which induced them to bring the suit. As said in the foregoing cases, the requisite diversity of citizenship existing, and the amount in controversy exceeding the jurisdictional amount of the court, and being vested with a justiciable controversy, this court will not concern itself about the motive which actuated the plaintiff in bringing the suit.

In addition to the above cases, this court determined in *Lanier* v. *Nash*, 121 U. S. 404, that an assignment of a note secured by mortgage upon a formal guaranty of collection by the assignor, for the purpose of vesting title in such assignee, in

order to enable the assignee to bring the suit in a Federal Court, would not oust the jurisdiction of the Federal Court. In that case, from the record it is apparent that the assignor paid all attorney fees and court costs, although it is not so stated in the opinion.

In *Cross* v. *Allen,* 141 U. S. 528, there was also an assignment of a mortgage for the sole purpose of enabling the assignee to bring suit for foreclosure in a Federal Court, but the transfer was *bona fide* and the jurisdiction of the court was sustained.

In *Lehigh Mining & Mfg. Co.* v. *Kelly,* 160 U. S. 327, it was alleged that the property had been conveyed to a corporation organized in another state by the same stockholders and officers, and that the property was collusively conveyed to such corporation for the declared purpose of enabling it to bring suit in a Federal Court. The late Justice Harlan, in a lengthy opinion, reviewed the cases in this court upon the subject, and held that the jurisdiction of a Federal Court

> "cannot be affected or impaired merely because of the motive that induced his grantor to convey, or his vendee to sell, and deliver the property, provided such conveyance or such sale and delivery was a real transaction by which the title vested without the grantor or vendor reserving or having any right or power to compel or require the reconveyance or return to him of the property in question." (pg. 336.)

In *Dickerman* v. *Northern Trust Co.,* 176 U. S.

181, a judgment upon an open account was, by consent of the parties, entered, the allowing of which judgment was a violation of the mortgage securing an issue of bonds. Thereupon the Trust Co. brought suit to foreclose. At page 190 the court said:

> "If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to the foreclosure that the mortgagee was animated by hostility, or other bad motive."

Again, at page 192:

> "The law is equally well settled that if a person take up a *bona fide* residence in another state he may sue in a Federal Court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the state in which the court was held. * * * So, too, it has been held that a person may purchase stock in a corporation for the very purpose of bringing a stockholder's suit, and that the law will not inquire into the motive which actuated his purchase."

This being the case, it is immaterial whether or not the appellants received aid from The Denver Union Water Company in payment of court costs and solicitor's fees, because that constituted the motive which actuated them in the premises. The only thing this court will inquire into is whether or not, at the

inception of the case, the appellants had a controversy within the jurisdiction of a Federal Court.

In *Chicago* v. *Mills, supra,* an officer of the Gas Co. and one of the largest stockholders, contributed toward the expense of the suit, paying the same out of his own resources, but the court said (p. 330):

> "When a citizen of one state has a cause of action against a citizen of another state, which he may prosecute lawfully in a Federal Court, and when the suit is free from fraud or collusion, his motive in preferring the federal tribunal is immaterial."

The question of contribution has frequently arisen in the Circuit Courts, and in the Circuit Court of Appeals of the various circuits.

In *Champagne Lumber Co.* v. *Jahn,* 168 Fed. 510, before the Circuit Court of Appeals of the 7th Circuit, one Nyback had obtained a judgment against the Lumber Company, at which time he had neither the means, ability, inclination nor intention to further prosecute any action to enforce collection of the judgment, and at the instigation of attorneys assigned the judgment to them for the purpose of collection. The court held that that transaction did not oust the court of jurisdiction.

In another case before the Circuit Court of Appeals, 7th Circuit, viz.: *Consumers' Gas Trust Co. v. Quinby,* 137 Fed. 882, the suit was brought by Quinby as a stockholder on behalf of himself and all others similarly interested. Other stockholders, citizens of the same state as the corporation, contributed

to the expenses of the suit, yet that fact, it was held, did not render the suit collusive.

In *Woodside* v. *Ciceroni*, 93 Fed. 1, the Circuit Court of Appeals, 9th Circuit, held that a transfer of an unpatented mining claim to a laborer for one-third its value, and for $10 cash and the balance secured by mortgage, did not show collusion, and the suit, an adverse proceeding, was retained by the court, notwithstanding it is apparent, from a reading of the decision, and the fact that the plaintiff was an ordinary laborer and could only pay $10 in cash toward the purchase price, he was rendered assistance in money by other parties interested.

Again, in *New Albany Water Works Co.* v. *Louisville Banking Co.*, 122 Fed. 776, the Circuit Court of Appeals, 7th Circuit, held in a stockholders' suit that contribution by other interested stockholders did not render the suit collusive. At page 779, the court said:

> "Neither the fact of citizenship of other stockholders, majority or minority, nor of their attitude to the controversy by contribution or otherwise, is material to relief under the bill, if the management of the corporation is adverse to the objects of the bill and is not in collusion with the complainants in any sense. * * * The utmost that may be inferred from the allegations in the present case of combination with the Indiana stockholders, is that they induced the complainant to file a bill and are contributors to the expense. *Conceding this, the suit is not collu-*

*sive in the sense of either statute or rule, and is within the jurisdiction of the trial court."*

That is the exact situation in the case at bar. The Denver Union Water Co. is one of the largest taxpayers in the City and County of Denver, and is vitally interested in the question of whether or not the City shall be saddled with $8,000,000 of a bond issue under a law which it is contended and has been held to be unconstitutional and void. That company had a right to contribute to the expense; it had a right to come in after jurisdiction attached, and join as a party and assist in any and every way in the advancement of the suit.

In *McEwen* v. *Harriman Land Co.*, 138 Fed. 797, Circuit Court of Appeals, 6th Circuit, certain claimants assigned their claims to a receiver, for the purpose of bringing suit in a Federal Court, and executed bonds for costs to indemnify the receiver, against any and all costs, expenses, etc. The court held that it did not constitute collusion, nor was such an agreement champertous or void. Mr. Justice Lurton, while Circuit judge, took part in deciding the above case.

In the case of *Bowdoin College* v. *Merritt*, 63 Fed. 213, Mr. Justice McKenna, while Circuit Judge, held, in an action brought by beneficiaries under a trust deed upon behalf of themselves and others, that the fact that the trustees under the trust deed, Stanley and Purrington, were willing, or even urged, that the plaintiffs sue, that they were friendly to the action and that they secured the consent of other par-

ties to advance trust money to the plaintiff after the suit was commenced, to purchase the interest of one of the beneficiaries, did not constitute collusion, and that the court had jurisdiction of an action so brought.

In *Mexican National Coal, etc. Co.* v. *Frank*, 154 Fed. 217, it was contended that the plaintiff should not be permitted to prosecute the suit, because it was brought in pursuance of an illegal, champertous and improper agreement, whereby the plaintiff brought the suit entirely at the expense of a third party; but it was held that the plaintiff, being vested with a justiciable controversy within the jurisdiction of the court, the court had jurisdiction.

## CHAMPERTY AND MAINTENANCE.

The payment of solicitor's fees and court costs by The Denver Union Water Company, does not constitute champerty, nor is it maintenance. The Water Company, being one of the largest taxpayers in the City and County of Denver, had a direct, personal interest to subserve, and has no other interest in the suit whatever.

Ever since the decision in the case of *Boone* v. *Chiles*, 10 Peters 177, to the present time, this court has held that champerty or maintenance would not even constitute a ground of abatement of a suit, much less could such objection be interposed to the jurisdiction of the court.

In *Burnes* v. *Scott*, 117 U. S. 582, 589, the court again held that the question of champerty or maintenance could not be raised by a plea in abatement,

but could only be interposed when a suit was brought directly upon a contract, and that in a case where the English statutes against champerty and maintenance had been adopted.

On the authority of *Burnes,* v. *Scott, supra,* the Supreme Court of Colorado, in the case of *Seaton Co.* v. *Idaho Spgs. Co.,* 49 Colo. 122, 131, held that a champertous contract for the prosecution of a case cannot be interposed as a defense, but can only be set up between the parties when the agreement is sought to be enforced.

In Colorado the English common law rule of maintenance and champerty was never adopted, and does not exist in that state.

> O'Driscoll v. Doyle, 31 Colo. 193, 198.
>
> Mining Co. v. Bentley, 10 Colo. App. 271, 274.

In the latter case several persons had independent interests in adversing an application for patent of a mining claim. It was agreed that if one of those interested should bring the suit the owners of the Mollie Gibson would pay all costs and expenses. The right to maintain such suit was questioned. It was held that the owners of the Mollis Gibson had an interest and concern in the suit, and if the adverse suit prevailed the result would have been a material and direct benefit to them. At page 275, the court said:

> "Where the validity of a mining location is at issue, and where there are a number of claimants to different portions of the

ground embraced in the disputed location, we see no objection either in morals or law to the question being tested by one suit instituted by one of the contestants and carried on at the expense of all interested in the general result. *Such a course of procedure would not militate against the purpose of all statutes of maintenance and champerty, which is to prevent strangers from obtruding themselves into suits and promoting vexatious litigation.*"

The court cites with approval the statement made by the court in *Duke* v. *Hooper*, 2 Mo. App. 1, to-wit:

> "The whole doctrine of maintenance and champerty is a relic of a state of things long since passed away."

This decision is approved by the Supreme Court, in *Seaton Co.* v. *Idaho Springs Co., supra*, and is cited with approval by Justice Vandeveter, while Circuit Judge, in the case of *Rucker* v. *Bolles*, 133 Fed. 858, 862.

*In Jahn* v. *Champagne Lumber Co.*, 157 Fed. 407, District Judges Quarles, of Wisconsin, commenting upon what was said to be a champertous contract, said:

> "In the absence of any bargain to share the recovery, no just criticism can attach to one offering such friendly aid," (to-wit,the payment of costs and expenses of litigation.)

This case was affirmed on appeal (168 Fed. 510.)

In *Ross* v. *City of Ft. Wayne,* 64 Fed. 1006, Circuit Judge Woods held that where a person, having an interest in the subject matter of a suit, buys the interest of the plaintiff, and thereafter prosecutes the suit himself, he was not guilty of maintenance.

The same was held by District Judge Burns, in *Mexican Natl. Coal, Etc., Co.* v. *Frank,* 154 Fed. 217, 224.

The same rule was adopted in Colorado, in *O'Driscoll* v. *Doyle,* 31 Colo. 193.

The payment of solicitor's fees and costs in this case, by the Water Company, under the authorities did not constitute maintenance or champerty. It did not constitute collusion; it did not oust the trial court of jurisdiction; it could not even be criticised as against public policy, because, as a taxpayer, the Water Company had a direct interest in the litigation, and had a right to assist in its prosecution if it so desired. The appellants were vitally interested, and, having a cause of action within the jurisdiction of a Federal Court, they had a right to bring it there, and had a right to maintain the action.

## COLLUSION.

Collusion means something more than assistance of a litigant with funds, by a person who is directly interested in the result of the litigation.

As said by Mr. Justice Brown, in *Dickerman* v. *Northern Trust Co., supra,* at page 190:

> "Collusion is defined by Bouvier as 'an agreement between two or more persons to defraud a person of his rights by the forms

> of law, or to obtain an object forbidden by law,' and in similar terms, by other legal dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means for the accomplishment of an unlawful purpose."

Not the first element of that definition is present in the case at bar. There is no attempt here to defraud anybody by a form of law, or to obtain an object forbidden by law. No fraud of any kind exists. There was no employment of any fraudulent means, or of lawful means to accomplish an unlawful purpose. The appellants were vested with a case within the jurisdiction of the court; it involved the jurisdictional amount; they were non-residents. The payment of the solicitor's fees and court costs by a party vitally interested in the result of the litigation was not a fraud upon the court, was not unlawful, was not against public policy, and does not constitute collusion within the meaning of the statute, because nobody was imposed upon, a cause of action was not created where none existed before, there was no shifting of or joining plaintiffs collusively or otherwise for the purpose of obtaining a cause of action cognizable in a Federal Court, there was no intermeddling by any one to create litigation where no right had previously existed; and, therefore, I say that the court erred in dismissing the bill of complaint upon the alleged ground of collusion.

Assuming, for the purpose of the argument, that the averments of the bill are true—and the present state of the pleadings requires this—any taxpayer,

resident or non-resident, had a right to stop, by judicial proceeding, the unlawful and unconstitutional expenditure of public funds belonging to the taxpayers. Such a taxpayer's bill, being for the interests of all taxpayers similarly situated, could be brought in either the State or Federal Court, depending on the citizenship of the complaint. If the bill had been filed by the Water Company in the State Court, the present complainants could have participated.

So, likewise, the complainants rightfully choosing a Federal tribunal, the Water Company had a right to participate therein.

It follows that if the resident and non-resident taxpayers confer and select the Federal tribunal, and the suit is brought by a *bona fide* non-resident taxpayer, the jurisdiction is not destroyed because a resident taxpayer with a common *bona fide* interest joins in the payment of the expense, or on account of its larger financial interests assumes the entire expense.

For all of which matters and things appellants pray that the order and judgment of the court below be reversed and the cause remanded for further proceedings in accordance with law.

Respectfully submitted,

EDWIN H. PARK,

*Solicitor for Appellants.*

# In the Supreme Court of the United States

No. 473.

OCTOBER TERM, 1912.

CLARA A. WHEELER and FRANK S. LUSK, *Appellants,*

*vs.*

CITY AND COUNTY OF DENVER, *et al., Appellees.*

## NOTICE.

To W. H. Bryant, William P. Malburn and Thomas R. Woodrow, Solicitors for Appellees:

You will please take notice that on Monday, the 9th day of December, A. D. 1912, at the incoming on said day of the Supreme Court of the United States, at Washington, D. C., I shall ask the Court to order the above entitled cause submitted for decision upon the briefs heretofore filed herein, or in the

alternative to place said cause on the summary docket for early argument, when and where you may attend if you think proper.

Respectfully,

EDWIN H. PARK,
*Solicitor for Appellants.*

Received a copy of the foregoing notice and attached motion this ..... day of November, A. D. 1912.

.....

.....

.....
*Solicitors for Appellees.*

# In the Supreme Court of the United States

No. 473.

OCTOBER TERM, 1912.

CLARA A. WHEELER and FRANK S. LUSK, *Appellants,*

*vs.*

CITY AND COUNTY OF DENVER, *et al., Appellees.*

## MOTION.

Come now the appellants and move the Court to order this cause submitted for decision upon the briefs heretofore filed herein, or in the alternative place said cause on the summary docket for early argument and in support of said motion show the Court:

The appellants on November 11, 1912, filed a motion to advance this cause in accordance with Rule 32 of the Court,

supported by a brief upon the merits, having on October 18th, in accordance with Rule 6, served notice upon the appellees that upon said 11th day of November the appellants would move the Court to advance said cause under Rule 32, for the reason that the only question certified to this Court for decision was one of jurisdiction of the court below. That on said 11th day of November, the appellees made application to the Court for an oral argument, and also filed a brief upon the merits, which application of the appellees for oral argument was thereafter denied. The appellees now refuse to join the appellants in a stipulation to submit said cause upon the briefs now filed without oral argument.

The record discloses, and the appellees admit at page 4 of their brief, the only question here for decision is the jurisdiction of the court below; that the cause should therefore be submitted under the provisions of Rule 32 is without question.

WHEREFORE, appellants pray that the Court order said cause submitted for decision upon the briefs now on file, or in the alternative place the said cause on the summary docket for early argument.

Respectfully submitted,

EDWIN H. PARK,
*Solicitor for Appellants.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1912.

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## No. 473.

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CLARA A. WHEELER ET AL., APPELLANTS,

*vs.*

CITY AND COUNTY OF DENVER ET AL.,
APPELLEES.

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**REPLY BRIEF OF APPELLANTS.**

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EDWIN H. PARK,
*Solicitor for Appellants.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1912.

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## No. 475.

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CLARA A. WHEELER ET AL., APPELLANTS,

*vs.*

CITY AND COUNTY OF DENVER ET AL.,
APPELLEES.

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## REPLY BRIEF OF APPELLANTS.

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At the eleventh hour, appellees, by a second brief, seek to inject into this case matter not only *de hors* the record, but not in existence at the time of the dismissal of this case by the court below.

This case is brought to this court solely on the question of jurisdiction, and so certified by the court below (Record, folio 63, page 31).

No answer was filed, no issue of fact tried. Nothing was before the court but the question of jurisdiction raised by the motion of appellees and the affidavits of both parties (Record, folio 68, page 33).

That motion is limited to the question of whether or not the parties were "improperly and collusively made or joined" contrary to the provisions of section 5 of the act of March 3, 1875.

This court has repeatedly ruled that in appeals of this character its jurisdiction is limited to the jurisdictional question presented to the court below, and cannot consider the merits except in cases where the jurisdiction of the court below was dependent upon a question of fact.

Huntington *vs.* Laidley, 176 U. S., 668, 679.
Swafford *vs.* Templeton, 185 U. S., 487, 494.
Excelsior W. P. Co. *vs.* Pacific B. Co., 185 U. S., 285.
Shields *vs.* Coleman, 157 U. S., 168, 176.
*In re* Lehigh M. Co., 156 U. S., 322-27.

The statute allowing this appeal is special and limited. In language it is similar to the act of 1907, allowing a writ of error to the Government in criminal cases, where in quashing an indictment the court construed a statute of the United States. In such case the court held in U. S. *vs.* Keitel, 211 U. S., 370, that it only had jurisdiction to pass upon the sole question of the construction of the statute and not the sufficiency of the indictment as a pleading. This ruling has been adhered to by this court in a number of cases since the Keitel decision.

Here the jurisdiction of the court was invoked by appellants on the ground of diversity of citizenship, while the appellees attacked the jurisdiction,

not upon that ground, or other facts contained in the bill, but solely on the ground of collusion.

The court, therefore, will not consider, on this appeal, any question going to the merits of the case.

As to all three of the propositions raised by appellees in this second brief, we have a right to take issue thereon and have determined in a *nisi prius* court their validity or sufficiency in fact; whether the constitutional amendment was in fact ever or at all properly submitted to or adopted by the people; whether the alleged ordinance was ever properly introduced or passed; what the issues were and who were the parties in the cause before Judge Teller.

The alleged amendment *is not yet* a part of the constitution of Colorado, no proclamation having as yet been made by the Governor to that effect, and, further, its validity and that of other constitutional amendments submitted at the same time are now before the Colorado Supreme Court for determination.

And, as to the so-called ordinance, the city cannot by ordinance validate a void organic law, or, after suit brought, by act or deed, change its status.

As to the so-called judgment of Judge Teller, it seems to be an attempt to enlarge upon the rule of *res adjudicata* or to assert *stare decisis* upon the decision of a *nisi prius* court, neither of which applies because we were not parties to the suit, nor is this court bound by the decision of such court. This decision is referred to in the so-called ordi-

nance, as well as the opinion of the then city attorney, to the effect that section 264-A of the city charter was void (page 9, 2d Brief). The record shows that Governor C. S. Thomas, then and now the law partner of Wm. H. Bryant, was one of the attorneys for the plaintiff in that case opposing the contention of the city. The case was at once removed to the Supreme Court of Colorado by the then city attorney, was there briefed, orally argued, and submitted for decision, and that, pending such decision, the first official act of Mr. Bryant, after his appointment as city attorney, was to dismiss the appeal, thus precluding a decision which would have settled for all time at least some of the questions that are now being raised, and which decision might then with some success have been relied upon by one or the other of the parties to this case.

The city attorney thus reversed his predecessor in office and dismissed the cause out of the Supreme Court while his law partner held a retainer upon the opposite side. Modesty should at least have restrained the city attorney from mentioning that proceeding.

I respectfully submit that there is nothing in the second brief of the appellees to command the attention of the court.

Respectfully submitted,

EDWIN H. PARK,
*Solicitor for Appellants.*

JUDD & DETWEILER, INC.,
PRINTERS,
WASHINGTON, D. C.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

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# No. 473.

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CLARA S. WHEELER AND FRANK S. LUSK,
APPELLANTS,

*vs.*

THE CITY AND COUNTY OF DENVER
ET AL., APPELLEES.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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## BRIEF OF APPELLEES ON MOTION TO ADVANCE.

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The appellees join in the motion to advance and are willing and anxious that the case may be expedited and determined without delay. We are not, however, willing to have the case submitted on printed briefs, and if as a condition of advancement it is necessary to submit the case on printed

briefs then we do not agree to the motion, but oppose the same.

So far as oral argument is concerned, however, we do not think it is necessary to take the full time allowed as in ordinary cases. We are willing, therefore, that the case may be put upon the summary docket, which, as we understand it, gives each side one-half hour each.

We, therefore, agree that the case may be advanced and placed on the summary docket for oral argument. If this cannot be done we oppose the motion.

Respectfully submitted,

WM. H. BRYANT,
*Attorney for the City & County of Denver,*
*Solicitor for Appellees.*

[18945]

# In the Supreme Court of the United States

OCTOBER TERM, 1912.

No. 473

CLARA A. WHEELER AND FRANK S. LUSK,
APPELLANTS,

vs.

CITY AND COUNTY OF DENVER, ALBION K. VICKERY, AUDITOR; LEWIS C. GREENLEE, TREASURER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

## BRIEF AND ARGUMENT OF APPELLEES.

### STATEMENT OF FACTS.

A bill was filed in the name of appellants, Wheeler and Lusk, for an injunction against the City and County of Denver, the Auditor, Treasurer, and Members of the Public Utilities Commission thereof, to restrain the is-

suance of bonds to the extent of eight million dollars by the City and County for the construction or purchase of a water-works system, and to restrain the expenditure of any moneys of the City and County by said Public Utilities Commission, on the ground that the Section of the Charter of the City and County of Denver which created the Public Utilities Commission, and authorized the issuance of said bonds and the expenditure of moneys, was void and unconstitutional.

At the time the bill was filed, there was pending in the United States Circuit Court for the District of Colorado, other suits in which the Court had theretofore granted an injunction restraining the City and County of Denver from proceeding with the issue of the identical bonds referred to in appellant's bill, and the granting of these injunctions had been sustained by the United States Circuit Court of Appeals, for the Eighth Judicial District. The cases referred to are now before this Honorable Court on Certiorari, the same being No. 642, entitled "The City and County of Denver vs. The New York Trust Company"; and No. 643, entitled, "The City and County of Denver vs. The Denver Union Water Company," and have recently been argued and submitted to this court. Appellants' bill attacked the validity of the charter provision authorizing the issuance of the bonds, and the creation of the Public Utilities Commission, on the identical grounds that were urged against said amendment in The Denver Union Water Company cases referred to.

The record shows that F. G. Moffat, the Treasurer of The Denver Union Water Company, telegraphed to appellant Lusk, a resident of Montana, to wire Moffat authority to engage attorneys to bring suit in Lusk's name, on condition that The Denver Union Water Com-

pany protect Lusk from expenses and all liabilities, and that Moffat received telegraphic consent to bring the suit on such conditions. The record also shows that the attorney for The Denver Union Water Company asked the attorney for appellants in this suit if he would be willing to bring the suit in the name of Lusk, and that appellant's attorney agreed to do so. Thereafter, appellants' attorney suggested the joining of Wheeler, his own client, and a resident of Nevada, provided the said Wheeler be protected against costs and counsel fees in said cause. Thereupon, appellants' attorney wired appellant Wheeler for permission to use her name in the suit, and agreed to protect her against expenses. He received the same day a telegraphic answer from Wheeler, advising him to use his own judgment in the matter. On the day following the receipt of Wheeler's answer, appellant's attorney wrote appellant Wheeler a letter, calling attention to the telegraphic correspondence, and to the fact that the Utilities Commission was seeking to compel the officers of the city to pay out on their warrants, about twenty thousand dollars ($20,000.00). The attorney then said very significantly, "I desire to bring suit in the Federal Court, and therefore had to get permission of a non-resident tax-payer to bring suit. * * * You will not be charged any expense or costs in the matter, either for court costs or attorneys' fees; and I will see that you are absolutely protected in every way from any liability whatever. Thanking you for permission to bring the suit in your name * * *." The record further shows that Gerald Hughes, the attorney of The Denver Union Water Company, employed appellants' attorney to institute this suit, on behalf of Lusk, and that this employment was made after a conference between Hughes and F. G. Moffat, who was

the Treasurer of The Denver Union Water Company.

The record further shows that on June 22, 1911, the date when Lusk consented by telegraph to the use of his name, he was possessed of Denver real estate, which was assessed at the sum of forty-two hundred dollars ($4,200.00), and that the total assessed valuation of all property subject to taxation in Denver was approximately one hundred and thirty-five million, four hundred and sixty-seven thousand, and fifty dollars ($135,467,050). If a comparison be made between the value of appellant Lusk's property and the total Denver assessment, and a computation made of the taxes against Lusk's property, on account of the issuance of said bonds and the expenses complained of, it will then become readily apparent why the attorney for The Denver Union Water Company was compelled to seek some other large property-owner to join in the action.

The appellees filed a motion to dismiss the bill, under Section 5 of the Act of 1875, for the reason that the Court had no jurisdiction in that the cause did not really and substantially involve a dispute or controversy properly within the jurisdiction of the Court, and that the parties complainant had been improperly and collusively joined, to make a case cognizable under the jurisdiction of the Federal Court. The Court, after reading the affidavits and argument, granted the motion and dismissed the bill.

## ARGUMENT.

Appellees contend that careful reading of the bill and affidavits in this case show convincingly that the circumstances attending the commencement of this proceeding, indicate and constitute a collusive arrangement made to give the Federal Court jurisdiction.

Collusion is an agreement for wrongful purposes.

Bilz v. Bilz, 33 Ill. App., 105.

The record in this case shows that The Denver Union Water Company was the party who desired this suit brought, and that the suit was actually brought for its benefit, and at its instance and request, and upon an express contract to pay the costs of litigation and counsel fee that might be incurred. It further appears that the Treasurer of the Water Company first secured the use of the name of appellant Lusk, but an investigation of the property owned by said appellant shows that its value was not sufficient to give him an interest in the action, to the extent of two thousand dollars ($2,000.00). It also appears that after, and not until, this information concerning Lusk's property had been secured, was any effort made to secure another and additional property-owner who was a non-resident. The cases relied upon by appellants in their brief to sustain the jurisdiction of the Federal Court are not binding or applicable, for the reason that in each of them the Court makes clear that there was no evidence of an agreement for a wrongful purpose. The cases cited are to the effect that contribution to the expense alone of litigation does not deprive the Federal Court of jurisdiction, *where the suit is free from fraud or collusion,* and that the motive for bringing suit is unimportant, *so long as no improper act is done, by which the jurisdiction of the Federal Court attached.*

A case exactly in point is that of Cashman v. Amador and Sacramento Canal Company, *et al.*, 118 U. S., 58. This was an appeal from an order of the Circuit Court, dismissing a suit, on the ground that it did not

really and substantially involve a controversy within the jurisdiction of the United States Circuit Court. Cashman, an alien, was the owner of land on the Cosumnes river. He filed a bill against the Canal Company to restrain it from operating its mines so as to allow debris to be deposited on his premises. It appeared that the County of Sacramento had contracted with Cashman to bring the suit, in his name, in order to sue in the Federal Court, and that the county was directly interested in the subject matter of the litigation, and agreed to pay the costs and expenses of the suit, including attorney's fees.

Mr. Chief Justice Waite, held that while the suit was brought in the name of Cashman, with his consent, that the controversy was really and substantially between the County of Sacramento and a citizen of the same state "and was, in reality, the suit of the county, with a party plaintiff collusively made, for the purpose of creating a case cognizible by the Circuit Court of the United States."

Surely it may be said that Cashman, who was the owner of seven hundred acres of land, which he claimed were injured by the debris of the canal company, had a direct interest in such suit, and might have maintained the same for his own use and benefit. The collusion which caused the case to be dismissed, was the same as the collusion in the case at bar. The wrongful purpose need not be an act which constitutes fraud. It does not imply the employment of fraudulent means, or an act which has the elements of fraud. The wrongful purpose, which is the test of collusion, is the deception practiced upon the court.

But in the matter of the jurisdiction of federal courts, the discrimination between suits between citizens

of the same State and suits between citizens of different States is established by the constitution and laws of the United States. And it has been the constant effort of Congress, and of this Honorable Court, to prevent this discrimination from being evaded by bringing into the federal court controversies between citizens of the same State.

Bernard Township v. Stebbins, 109 U. S., 253.

An agreement to obtain an object forbidden by law fills the definition of collusion.

Industrial & Mining G. Co. v. The Electrical Supply Co., 58 Fed., 743.

In this case the evidence clearly shows an agreement to obtain an object forbidden by law. It is not necessary to inquire into the motive of the parties. The suit is the suit of The Denver Union Water Company, a Colorado corporation, against residents of Colorado, and could only be brought in the state courts. The fact is clear that The Denver Union Water Company did not have the right to bring the suit that they desired brought, and contracted with two non-residents to bring the suit, and agreed to stand all expense thereof. It does not matter that Lusk and Wheeler perhaps had the right to bring the suit in their own names, for their own purposes and benefits, and for the use and benefit of all other tax-payers similarly situated. The record shows they did not do so, and had no intention of doing so until they were prevailed upon by The Denver Union Water Company and its attorney and officers. The plaintiff in the Cashman case had a clear legal right to bring the action in the federal court. He did not do so. The county who wanted the suit brought, and who could not, under the statute, bring the same, contracted with

Cashman to bring it, just as in the case at bar The Denven Union Water Company contracted with Lusk and Wheeler; and this contract which enabled the county and the water company to have done what they could not themselves do, is what this Honorable Court has held to be collusion.

There is another reason why the relief sought in the bill cannot be granted. The appellants are asking that the officers of the City and County of Denver be enjoined from making a bond issue of eight million dollars. The bill shows that the United States Circuit Court, for the District of Colorado, had, prior to the filing of the bill, enjoined this identical issue of bonds, and that said order had been sustained by the United States Circuit Court of Appeals, and was, at the time of bringing this suit, and still is, in full force and effect. The other expenditures sought to be enjoined by the bill do not, under any construction of the language of the bill and affidavits, exceed the sum of one hundred thousand dollars. The bill could not be brought to restrain the issue of this latter amount alone, exclusive of the bond issue, for the reason that the plaintiffs' interest in the subject matter of the controversy does not exceed the sum of two thousand dollars ($2,000.00). Consequently, it appears that if the bond issue of eight million dollars be eliminated from the subject matter of the controversy, the federal court has no jurisdiction. Appellees contend that this matter of the bond issue must be eliminated from the subject matter, for the reason that the Court will not grant an injunction to restrain an act which is already restrained by a prior injunction, even though it be by a person different from the one who first secured the injunction. So long as the injunction secured in The Denver Union Water Com-

pany cases above referred to continue in full force and effect, the officers of the City and County of Denver are as effectually restrained as they would be were a thousand injunctions issued from the same Court, and hence the injunction prayed for by the appellee in this action is unnecessary and uncalled for, so far as concerns the issuance of the bonds, and a Court cannot be called on to do a vain and unnecessary act.

Leverich v. Mayor of City of Mobile, 122 Fed., 549.
Dickinson v. Eichhorn (Iowa), 43 N. W., 620.
Police Jury v. Town of Mansura (116 La.), 41 Southern, 251.
Livingston v. Gibbons, 4 Johns I. Ch., 570.
22 Cyc., 780.
16 Am. & Eng. Enc. of Law, 365.

Appellees therefore submit that the order of the Court below, holding that the Court had no jurisdiction, and dismissing the bill, should be sustained, because the suit is collusively brought, and for the further reason that the bill does not show that the complainants have the necessary interest in the subject matter to give the Court jurisdiction.

Respectfully submitted,

W. H. Bryant,
William P. Malburn,
Thos. R. Woodrow,
*Solicitors for Appellees.*

# In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

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No. 473.

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CLARA A. WHEELER, ET AL., APPELLANTS,

vs.

CITY AND COUNTY OF DENVER, ET AL., APPELLEES.

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## BRIEF AND MOTION OF APPELLEES.

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Under Rule 32, this case has been advanced for argument. Rule 32 of this court refers back to Rule 6, relating to motions, and including motions to dismiss or affirm. Subdivision 5 of Rule 6 provides that, when the questions on which the cause depends are frivolous, the court will entertain a motion to affirm, even though it may refuse to dismiss the case. We presume that the same rule would apply where the case is here on the question of jurisdiction. If the issues involved in the court below are frivolous, and need no further consideration of the court, then the proper procedure is for the court to affirm the judgment. We submit that the issues raised in this case

have been determined by the courts of Colorado, by the legislative department of the City and County of Denver, and by the people of the entire State of Colorado, so that there is nothing before the lower court for determination, even though the court should entertain jurisdiction of the cause. We therefore make a motion that the cause be affirmed, in accordance with the usual practice under Rule 6.

We have to say upon this motion that the record shows that this case is brought by taxpayers to enjoin the officers of the City and County of Denver from enforcing the provisions of section 264a of the charter of the City and County of Denver, upon the ground that the section is void. Some sixty-five reasons are assigned as to the invalidity of the section. These reasons are copied from those set out by the Denver Union Water Company, in the suit brought by that company and lately argued in this court. Section 264a is an amendment to the charter of the City and County of Denver. The City and County of Denver is an organization created by Article XX of the Constitution of Colorado. By virtue of the provisions of that article, the people of the City and County of Denver frame their own charter and amend it as they see fit. Some of the merits of section 264a have been discussed before this court, in the case of The Denver Union Water Company vs. the City and County of Denver, which is now pending and undetermined before this court. Without going into the matters discussed in that case, we wish to call the attention of the court to three matters which completely dispose of the merits of the controversy beyond controversy. These are:

First—A constitutional amendment adopted by the people of Colorado on the 5th day of November, 1912.

Second—An ordinance passed by the City and County of Denver, and approved by the mayor on the 19th day of June, A. D. 1912.

Third—A decision by the District Court of the City and County of Denver, rendered on the 26th day of December, 1911.

We will copy each of these matters into the record in full, so there can be no misunderstanding concerning them.

First—On November 5, 1912, the people of the entire State of Colorado voted on an amendment to the Constitution of the State of Colorado, and it was adopted by a large majority. The State Canvassing Board has canvassed the returns on the amendment and declared it adopted, and probably by the time this brief is considered by this court the governor of Colorado will issue his proclamation declaring it to be a part of the Constitution of the state. This amendment is in words and figures as follows:

> "That Section 6 of Article XX of the Constitution of the State of Colorado, be and the same is hereby amended to read as follows:
>
> Section 6. The people of each city or town in this State, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the State of Colorado or said city or town, are hereby

vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all of its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the State in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general state or municipal elections, upon petitions filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the Secretary of State of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal offices, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, ballotting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or

towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessment, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny to such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the State of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and

towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the City and County of Denver and the Cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the Secretary of State, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the Secretary of State, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the City and County of Denver.

This article shall be in all respects self-executing."

We call the court's special attention to that part of the amendment validating the charter of the City and County of Denver, as it existed on November 5, 1912, and validating the charter from the date when the people adopted it. Certainly that is a declaration by the people of the entire State of Colorado that this section 264a is a part of the charter of the City and County of Denver, and is valid and binding. In other

words, section 264a has been adopted by the people of Denver, and has been ratified and approved by the people of the entire State of Colorado.

Second—We would also call attention to an ordinance passed by the City and County of Denver, and approved on the 19th day of June, 1912, which is as follows:

By Authority—Ordinance No. 85, Series 1912.

SUPERVISOR'S BILL NO. 57, INTRODUCED BY SUPERVISOR MCGAURAN.

A BILL FOR AN ORDINANCE CONCERNING THE PUBLIC UTILITIES COMMISSION.

WHEREAS, a petition was duly presented to the Council, prior to the General Election held in May, 1910, praying that the question of creating a new section of the Charter, to be known as '264-a,' be submitted to a vote of the people, at the General Election, and said Amendment was duly adopted; and,

WHEREAS, under said Amendment, The Denver Union Water Company failed to place a deed in escrow, as therein permitted, and an election was duly called and held, on the first Tuesday in September, 1910, for the incurring of a bonded indebtedness of eight million dollars ($8,000,000.00), for the construction of a water plant by the City and County of Denver; and,

WHEREAS, litigation at once arose, between The Denver Union Water Company and its various subsidiary companies and trustees, under its bonded indebtedness, and the Public Utilities Commission, created by Section 264-a, and the City and County of Denver, and an injunction was granted, in the United States Circuit Court for the District of Colorado, restraining the City and County of Denver from constructing a water-plant of its own, which said injunction was, on appeal to the Circuit Court of Appeals, sustained by that Court; and,

WHEREAS, after the rendition and the affirmance of said injunctive order by the Circuit Court of Appeals, in May, 1911, the opinion of the Attorney of the City and County was asked, as to the validity of said Section 264-a as a whole, and said Attorney advised that the same was invalid, and thereupon, the Auditor and Treasurer of the City and County refused to pay the warrants of the said Public Utilities Commission; and,

WHEREAS, various mandamus suits were brought to compel the Auditor and Treasurer to pay said warrants, and judgment was rendered, in the District Court of the City and County of Denver, sustaining the validity of said Section, and ordering the payment of said warrants, which judgment in the District Court was never superseded, and remains in full force and effect; and,

WHEREAS, in the meantime, the case in the United States District Court, wherein

the preliminary injunction was issued, proceeded to hearing, testimony was taken, and the mater was heard upon its merits, and finally submitted to said Court, on the 27th day of April, A. D. 1912, and is now undetermined; and,

WHEREAS, in the meantime, an application for a writ of Certiorari was made to the Supreme Court of the United States, for the purpose of reviewing the judgment of the Circuit Court of Appeals, in affirming the order granting said temporary injunction, and the said Supreme Court did, on the 27th day of May, 1912, grant said application for a Writ of Certiorari, and order said case to be submitted to it, upon the full record, for final determination; and,

WHEREAS, time is needed for the purpose of permitting the Supreme Court of the United States finally to pass upon these questions, said Court not meeting until October, 1912; and,

WHEREAS, said Public Utilities Commission necessarily incurred expenses, to fight the battles of the City in said litigation and has received no salaries for more than a year past; and,

WHEREAS, it is the opinion of this Council that the people of the City and County desire that its rights in all matters connected with the various controversies with The Denver Union Water Company, should be fully protected; and,

WHEREAS, it is also the opinion of this Council that there are other matters that the Public Utilities Commission may investigate and pass upon;

THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

Section 1. That the Public Utilities Commission, created by Section 264-a of the Charter be, and is hereby, confirmed and continued as agents and employees of the City and County of Denver, for the uses and purposes set forth in said Section 264-a of the Charter, and said Public Utilities Commission is hereby made the agent of the City and County of Denver, to act as such in all matters connected with the acquisition of a water plant for the City and County of Denver, whether by erection, condemnation, purchase or otherwise.

Section 2. That the Public Utilities Commission is hereby made a Bureau of the Board of Public Works, and its members shall be elected and vacancies filled, for the terms and in the manner provided by Section 264-a of the Charter, and shall receive the salary and give the bond as threrein provided, and that the Mayor also shall appoint the members of said Commission from time to time, for the terms provided for in said Section 264-a of the Charter.

Section 3. The terms, conditions and duties of the employment of said Public Utili-

ties Commission, shall be as set forth in Section 264-a of the Charter, and all the powers and duties set forth in said Section are hereby conferred upon the Public Utilities Commission, provided for by this ordinance.

Section 4. It shall be the duty of said Public Utlities Commission, in addition to the various duties and powers conferred upon it by Section 264-a, under the general direction of the Board of Public Works, to gather information and statistics on all matters concerning all public utilities now operating or that may desire to operate in the City and County of Denver, including telephone companies, street railway companies, gas and electric companies, steam heating companies, railway companies, and any other public utilities, and to report from time to time to the Mayor, the result of their efforts.

Section 5. Said Public Utilities Commission shall perform such other duties relating to public utilities as may be referred to them by the Mayor, and perform such acts in conncetion therewith as may be required by the Board of Public Works.

Section 6. All salaries and expenses provided for by this Ordinance or by Section 264-a of the Charter, including unpaid salaries for 1911, and all necessary expenses heretofore or hereafter incurred by said Public Utilities Commission, are hereby declared to be proper charges against the City and County of Denver, and shall be paid by

the Treasurer, out of the Public Utilities Commission fund, upon the warrant of said Public Utilities Commission, as provided for in Section 264-a of said Charter.

Section 7. That there be, and there is hereby, transferred to said Public Utilities Commission Fund, the sum of twenty thousand dollars ($20,000.00), the same being the amount heretofore and by Ordinance No. 10 of the Series of 1912, appropriated and set aside to pay the salaries and expenses of said Public Utilities Commission.

JNO. W. FORD,
President of the Board of Aldermen.
JOHN B. McGAURAN,
President of the Board of Supervisors.

Signed and approved by me this 19th day of June, 1912.

HENRY J. ARNOLD,
Mayor.

Attested by the undersigned with the corporate seal of the City and County of Denver.

OTTO F. THUM,
Clerk of the City and County of Denver."
[Seal]

This was the first ordinance passed by a new administration that went into office on the first day of June, 1912. That ordinance validates section 264a, and makes the Public Utilities Commission a legal body; so that there can be no suit to enjoin it from discharging its duties. This ordinance was passed by

virtue of the authority conferred upon the countil of the City and County of Denver to exercise all legislative powers granted to the said city.

Third—The third matter that we desire to call to the attention of the court is the following decision of Judge Teller, rendered in the District Court of the City and County of Denver, upholding section 264a, before either the ordinance or the constitutional amendment was adopted. This decision has never been reversed, and stands as the law in the State of Colorado:

> "Teller, J. The defendant, by his return and answer to the alternative writ, denies that plaintiff has any right to the writ, because, first, he has no title to the office; second, there is no such office as he claims, for the reasons (a) that section 264a is unconstitutional for several reasons; and (b) that said amendment 264a was never legally adopted. The demurrer to the return raises the question of the sufficiency of these objections.
>
> Counsel for plaintiff insist that the question of title to office cannot be tried in this proceeding; and further that the defendant, being a ministerial officer, cannot question the validity of section 264a of the charter.
>
> It is well settled that title to office, or the question of the existence of an office, must be determined in quo warranto proceedings, and that in mandamus the Court is powerless to pass upon those matters.

Our Court of Appeals, in Henderson vs. Glynn, 2 Colo. App., 303, said:

'When a person is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested on mandamus. This is the established doctrine, both in England and the United States, and might be supported by almost innumerable decisions.'

It being settled that quo warranto is the proper proceeding in which to determine these two questions, it follows that they cannot be determined in mandamus, which lies only where there is no other remedy.

So much of the return, therefore, as questions the creation of the office of the Public Utilities Commission, or denies the election of plaintiff thereto, will not be considered.

Counsel for defendant urge that although there are decisions in this State which deny the right of ministerial officers to question the validity of a statute under which they are called upon to act, yet that an exception should be made, and is made in reported cases, in favor of disbursing officers; since if they pay under an invalid act it is no protection to them.

Our courts of last resort have never, it appears, passed upon this exact question, but there are intimations which suggest a recognition of the distinction insisted upon by counsel, as above stated. Our courts have said that the state treasurer and state auditor disburse

public funds at their peril, they being required to determine whether or not an act under which they pay is valid. No reason is evidence why this same rule should not apply to city disbursing and accounting officers, and upon principle it would seem that if an officer disbursing money assumes the risk of the law's being valid, he should be allowed to insist upon its validity being established before he pays.

In Newman vs. the People, 23 Colo. 300, in which a sheriff was charged with omitting to perform an official duty, a defense was attempted on the ground that the law imposing the duty was void, the part of the law being attacked relating to the duties of a judicial officer, and not to those of the sheriff himself. The court said:

"The sheriff is not in a position to question the validity of the act so far as it prescribes the duty of the judicial officer. As we understand the rule, no person can attack the constitutionality of a statute whose right it does not affect, and who, therefore, has no interest in defeating it. Expressed differently, it is, we think, a fair deduction from the authorities that, in advance of a determination by a court of competent jurisdiction, a ministerial or executive officer cannot, for himself, pass upon the constitutionality of a statute, except in so far as it directly prescribes his official duties, or confers some power, or imposes some liability upon him, or prescribes the range of his official conduct. When called

upon to act, the sheriff might properly determine for himself the constitutionality of that provision directing him to seize gambling devices, and the judicial officer, in a proper case, may raise the constitutional objection to that clause relating to his office.'

The right of plaintiff to the writ, the possession of the office not being in question, is predicated upon the provisions of section 264a of the charter, which attach a salary to the office, and direct payment of warrants drawn by the Commission, which is authorized to draw the same.

Under the rule above laid down the defendant can question the constitutionality of the act only as it affects these provisions; hence, he cannot assert its invalidity because of any supposed conflict with the constitution, state or federal, not involving his rights or duties. That the act may impair the obligation of a contract with someone else, or deprive someone of property without due process of law, or deny to another the equal protection of the law, and so be open to attack by the person injured thereby, is no ground of objection to it by defendant.

There is no allegation that the amendment violates any of defendant's rights, or imposes upon him any duty which is in any sense unlawful. His sole ground of attack, which can be here considered, is that the amendment is void because never legally adopted, and hence no duty rests upon him by virtue thereof. To

this extent he may challenge the validity of the section. This presents the single question as to the submission and adoption of the amendment, that is, its form and the manner of its adoption.

It is urged on behalf of the defendant that the amendment is void because of the small vote upon its adoption. This same objection was made to the validity of Article XX of the constitution, and the Supreme Court, in the Sours case, rejected it, holding that all who failed to vote must be considered as assenting to the determination of the matter by those who did vote on it.

It is further urged that it was never adopted and enacted because it contains more than one independent and unrelated subject contrary, it is said, to the provisions of Article XX of the constitution. This question is not without difficulty, and demands careful consideration.

It is asserted that only one subject may be voted upon in one proposition, and that such proposition must express the subject in its title; this, it is presumed, because of some supposed application of the constitutional provision limiting a legislative enactment to a single subject, which must be expressed in the title. In support of this proposition a number of cases are cited wherein a vote on more than one proposal, as to water works, light plants, etc., is held improper and unauthorized; but in every one of these cases the decision turned

upon the question of compliance with a statute authorizing the vote. No case is cited which decides that fundamentally such a form of submission is unlawful. In any event, these decisions cannot be regarded as controlling. They do not refer to acts of *legislation*, such as is now under consideration, but to mere voting upon the question of consent that a power, to be exercised only in case of such consent, be exercised. This consent, which is the contingency upon which the power may be exercised, must manifestly be given in the form prescribed, or the power does not arise. When the statute authorizes a vote upon one proposition, there is no authority to submit anything else. Such a vote is no more than an answer to a direct question to the voters. By it the elector gives or refuses his consent to the vitalizing of an act whose provisions have been considered and determined by the legislative assembly. The vote is, therefore, in no proper sense, an act of legislative power.

The act of the voters here in question is truly legislative, the electors of Denver now having the power to amend the city charter, which was formerly exercised by the legislature. They consider and determine as to every part of the act, and their votes enact it. The power being legislative, it is subject to no limitations not expressed in the constitution or charter, or implied from those which are expressed. The constitutional provision does not in terms apply to direct legislation by the

people, and, in the absence of any authority holding it applicable by implication, it cannot be held that the form of the amendment as submitted and adopted renders it invalid; for an act will be held unconstitutional only when it appears so beyond a reasonable doubt.

I am not prepared to admit the contention of plaintiff's counsel that amendments to a charter are to be governed by the same rule as are amendments to a state constitution. Rather are they like legislative acts. The making and submission of an entire charter may be subject to rules applying to constitutions. If counsel's position be correct, no objection could be made to the number of subjects in section 264a, since it was held in the Sours case that an amendment to the constitution, covering a number of unrelated subjects, might properly be submitted. In the Court's view of the case it is unnecessary to determine whether or not that is controlling in this case, for it is not clear that more than one subject was submitted in this amendment to the charter.

If it were a question as to the title to a legislative bill, there would be no difficulty in forming a title and passing the whole act as one measure. It would be fully described as 'A Bill for an act to provide a system of water works for the City and County of Denver and for the management and conduct thereof.' Every part of section 264a is germane to that title, and that, under our decisions, is all that is required. The history of the charter of Den-

ver shows that far greater changes than this have been made in it by single legislative acts, and no one doubted their validity.

If, then, it could be enacted in its present form as a legislative amendment to a city charter, why may it not be so enacted by the direct legislation authorized by the constitution? To deny it is to create a distinction between the two methods of legislation, for which no authority is produced.

To separate for submission the parts which go to make up a measure like this, if they be capable of such separation, may produce manifold complications, omitting possibly parts that are vital to that portion of the measure which is adopted, and so defeat or long delay the going into effect of the amendment desired. Any considerable amendment to a city charter will naturally involve a number of parts capable of separate statement; but when they are all necessary to the effectiveness of the whole, they should be considered and acted upon together. This, it is said, shows that a charter convention should be called for such a case. But this no more applies in this case than it does to an amendment of a city charter by legislative act. From the adoption of our constitution it was settled law that the legislature could amend the charter of Denver granted by the territorial legislature, but could not annul it and make a new one; yet the legislature amended the charter in matters involving as many subordinate subjects as are covered by

this section. Witness, for example, the creation of a board of public works, with the specification of its duties, methods of procedure, etc. Here again, it must be recalled, that the constitutionality of the section is presumed, and the court is not justified in holding it otherwise, unless its invalidity clearly appears. It cannot be said that it so appears.

It is further urged that so much of the section as prohibits the application of any other part of the charter to the acquiring or construction of water works deprives the city of power to grant a franchise as provided in section 4 of Art. XX of the constitution. And, further, that this section is in conflict with Article IX of the existing charter. Under the rule above stated these questions can be raised only when it appears, in a cause pending, that some one's rights have been invaded as a result of these provisions. They might be invaded without any effect upon those parts of the section which prescribe the rights of the plaintiff and the duties of the defendant. Those matters need not, therefore, be determined now.

The conclusion of Judge Bliss, that the entire section is not invalidated by the decision in the case pending in the federal court, is accepted, after full consideration.

It not appearing beyond a reasonable doubt that the section is void, it must be held valid. No question is made that the plaintiff is entitled to the relief sought if section 264a is valid and the demurrer to the answer will

accordingly be sustained and the peremptory writ will issue.

In cases numbered 51625 and 51626, the same orders will be made, as the same questions are involved."

We submit, therefore, that the questions raised in the pleadings in the cause below are frivolous, and that the judgment should be affirmed.

Respectfully submitted,

W. H. BRYANT,
W. P. MELBURN,
T. R. WOODROW,
Solicitors for Appellees.

# WHEELER *v.* CITY AND COUNTY OF DENVER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 473. Argued January 7, 1913.—Decided June 10, 1913.

The fact that the plaintiff in a taxpayer's suit against a municipality was solicited to bring the suit and was indemnified against liability for costs and fees is not enough in itself in the absence of any illegal purpose to make the case collusive so as to deprive the court of jurisdiction. *Cashman* v. *Amador Canal Co.*, 118 U. S. 58, distinguished.

The motives of litigants in seeking Federal jurisdiction are immaterial. *Blair* v. *Chicago*, 201 U. S. 401.

A plaintiff is not to be charged with bad faith in bringing an action simply because after it was commenced the same issue was raised and decided adversely in an action between other parties.

THE case is here on a question of jurisdiction.

The appellants filed a bill in equity in the Circuit Court for the Eighth Circuit, District of Colorado, against the City and County of Denver and the other appellees, who constitute the Public Utilities Commission, to restrain them from paying out any moneys authorized by the provisions of an amendment to the charter of the city, and likewise to restrain them and each of them from issuing or attempting to issue $8,000,000 of bonds authorized at an election directed by the amendment to the charter of

the city. The bill also prayed an accounting of money already expended by reason of their supposed election and authority as members of the Public Utilities Commission and that they be required to reimburse the city therefor, that § 264A of the charter be declared unconstitutional and void, and all further action thereunder be forever restrained and enjoined, and all acts heretofore done and steps taken thereunder be declared wholly illegal, improper and without authority of law.

The bill alleges the requisite citizenship of the parties and the jurisdictional amount. It further alleges the following:

"Appellants Wheeler and Lusk were respectively owners of real estate in the City and County of Denver of the assessed valuation of $35,000 and $42,000 respectively. For the year preceding the filing of the suit the assessed valuation of all property within the City and County was $135,467,050. At a general city election held in May, 1910, it was claimed by the appellees that an amendment to the charter of the city was adopted, which amendment provided for the acquisition, by purchase or otherwise, by the city, of a water works system, provided a Public Utilities Commission to have charge and control of such works, named the persons who were to constitute the Commission, their terms of office, salaries, and duties, and authorized them to issue bonds to the extent of $8,000,000 for the construction or purchase of such water works system and other duties."

The bill attacks the amendment on various grounds, among which are—that it was not properly submitted to the voters of the city; that the amendment was void because it submitted to the electors divers questions in one, which, under the submission, could only be voted for as a whole; that the amendment established the office of Utilities Commission, and by the same act filled such office, and that the amendment violated the state and

Federal Constitutions; that another suit was pending in the Federal court in which the Circuit Court of Appeals for the Eighth Circuit had sustained a temporary injunction theretofore granted by the Circuit Court for the District of Colorado, and the court's order declared that the amendment violated the contractual rights of the Denver Union Water Company under a contract then existing between that company and the city, and that nevertheless the city was proceeding under the amendment, to spend the money of the tax-payers of the city. Appellants filed the bill as tax-payers of the city in behalf of themselves and all other tax-payers.

Appellees made a motion to dismiss the bill on the ground that the court had no jurisdiction of the cause in that it did not involve a dispute or controversy properly within the jurisdiction of the court and that the parties had been improperly and collusively made or joined for the purpose of attempting to create a case cognizable under the laws of the United States.

An affidavit of Edwin Van Cise, one of the Public Utilities Commission, was submitted with the motion. It averred that appellants (complainants in the bill) were respectively residents of Montana and Nevada, that appellant Lusk was formerly a resident of California and a personal friend of Mr. F. G. Moffat, of the City of Denver, a gentleman who was interested as a stockholder or bondholder, or both, or in some other capacity, in the Denver Union Water Company, and that Wheeler is a client of Edwin H. Park, solicitor for her and Lusk in this cause. On the nineteenth or twentieth of June, 1911, Moffat, by the authority or consent of the water company, sent Lusk a telegram as follows:

"Would you be willing as a non-resident taxpayer to bring suit in Federal Court to stop illegal expenditure of public moneys by Utilities Commission if protected by Water Company on expenses and all liabilities? If so,

wire me authority in your name to engage attorney and bring suit."

Lusk replied as follows:

"Please engage necessary counsel and take proper steps to protect against illegal expenditures by Utility Commission. Am owner of four lots corner Ninth and Sherman, and I object to the proposed expenditures."

It is averred on information and belief, that upon the latter telegram Moffat, or some one acting for the water company, retained Park in the name of Lusk, but really for the water company, to prepare and file the bill in this cause. It being found upon consultation, that the amount in controversy with Lusk as sole complainant was insufficient to give the court jurisdiction, it became necessary to procure another non-resident owning property in the city. Park was thereupon authorized to confer with his client Wheeler, with a view to securing her coöperation, she to be guaranteed against all expenses. Thereupon the following telegram was sent by Park to her:

"Will you permit use of your name in suit here to restrain misuse of taxes by City Officials? If so, wire me to bring such suit. I advise the bringing of the suit and will protect you against expenses." To the telegram the reply was sent, "Yes, use your judgment in the matter." The next day after the receipt of this telegram Park wrote Wheeler as follows:

"My dear Mrs. Wheeler: On yesterday I wired you for permission to bring a suit in your name against some of the city officials for misuse of taxes, and received your reply authorizing me to go ahead. I brought the suit and filed it on yesterday. The suit is to restrain the Water Commissioners of Denver from further expenditures looking toward the purchase of a water plant by the city of Denver. The city is already enjoined in another proceeding in which the Water Company was a party. Since that time the Water Commission has spent $31,000 to hold an

election, and about $25,000 for other purposes; and are seeking to compel the city to pay out on warrants about $20,000 more.

"The courts have already held that the amendment to the charter establishing a Water Commission for the purpose of purchasing or building a water plant is unconstitutional and void, and it is our purpose to stop the spending of any more of the people's money in that direction.

"I desire to bring suit in the Federal Court, and therefore had to get permission of a non-resident taxpayer to bring suit, which accounts for my telegraphing you for permission.

"You will not be charged with any expense or costs in the matter, either for court costs or attorney's fees; and I will see that you are absolutely protected in every way from any liability whatever. Thanking you for your permission to bring the suit in your name, I remain."

The affidavit expressed the conclusion that the parties to the bill were improperly and collusively joined for the purpose of creating a cause cognizable in the United States Circuit Court, in the interest and at the cost of the Denver Union Water Company, neither of the parties having knowledge of the joinder with the other, or of any connection of the other with the cause, and having no interest which was so imperiled as to cause them to proceed on their own motion and at their own expense.

The affidavits of Park and Moffat were filed in opposition to the motion to dismiss. Park's affidavit states the following: He is solicitor for complainants (appellants here). On June 11, 1911, the question of bringing a taxpayers' suit against the Public Utilities Commission was brought to his attention by Mr. Gerald Hughes, and he was asked if he would be willing to bring such suit for Lusk, that Moffat had received a telegram from Lusk authorizing him (Moffat) to retain counsel for him for the purpose of bringing suit in the Federal court.

Wheeler then owned property within the city and county subject to taxation for the expenditures of the Commission. Park had been her legal adviser for some time, and he suggested to Hughes the advisability of joining her in the suit so that she might receive the same protection and benefit as Lusk, provided she could be protected against costs and counsel fees. Park believed it to be for her interest to be so joined. He thereupon sent her the telegram and received the reply set out in the affidavit of Van Cise, and brought the suit for her and Lusk and all other tax-payers.

The affidavit set out the property owned by her and Lusk and that she is neither a stockholder nor a bondholder nor otherwise financially interested in the water company. It averred further as follows: It is not true that the suit was brought at the solicitation or request of the water company, but on the contrary, Park suggested the joinder of Wheeler because in his opinion, as her attorney, it was to her interest to be joined, provided she could be protected against costs and attorney's fees; he so advised her and she accepted his advice and authorized the suit. It is not true that the suit is one brought solely in the interest or for the benefit of the water company, but it is brought not only for the benefit of Wheeler and Lusk but of all other property owners, including the water company, which is a large property owner, its property being assessed for taxation at about $2,500,000, being approximately 2% of the total assessed valuation of all property within the city and county, and that, as Park was informed and believed, the water company, by reason of its large interest as a property owner and taxpayer, was willing to protect Wheeler and Lusk against costs and attorney's fees. Park denied the suits were collusive.

Moffat's affidavit is to the following effect: On June 19, 1911, he was treasurer of the water company. In May, 1911, the Circuit Court of Appeals for the Eighth Circuit,

in the case of the *New York Trust Company* v. *The City and County of Denver*, had rendered an opinion that the amendment to the charter of Denver was unconstitutional and void. The water company was a party to that suit and in a cross bill had alleged its property holdings in the city and that it paid approximately one-fiftieth of all the taxes assessed and collected in the city. Notwithstanding the opinion and decision of the court, the Utilities Commission and its members openly and publicly declared their purpose of ignoring the decision and continuing to disburse the public funds of the city; announced their intention of instituting other and independent litigation in the state courts for the purpose of raising the identical questions decided by the Circuit Court of Appeals. Many taxpayers, citizens of Colorado and of other States, complained to the officers of the water company of such illegal attempts and requested the officers of the company to take some proper and legal steps to stop such unwarranted action. These conditions were discussed between Moffat and Gerald Hughes, counsel for the company, and it being advisable that the litigation should remain in the Federal courts, free from local prejudice or influence or the attacks of local newspapers, Moffat suggested that Lusk, who had been a resident of Denver and knew the conditions surrounding the litigation, might have a sufficient interest and be willing to institute such other suits in the Federal court as might be necessary and proper to prevent further illegal expenditure of public funds affecting not only Lusk, but other taxpayers. Thereupon Moffat, with the consent and advice of Hughes, sent the telegrams set out in Van Cise's affidavit. Moffat, through Hughes, employed Park to institute the suit. Moffat informed Park that the water company would protect him in regard to expenses, but did not at that time inform him of the exchange of telegrams with Lusk. The latter's desire as a taxpayer to institute and maintain the suit is

averred, and it is denied that he is a stockholder or bondholder of the water company or that he has further or other interest than that of a taxpayer. It is averred that the water company is interested in the litigation, and has a right not only to maintain its rights as a taxpayer, but, if it sees fit, to join in this suit as a nominal party.

An affidavit of the members of the Commission was filed in reply in which they aver that they have not, nor has either of them, at any time declared the purpose as charged against them in Moffat's affidavit, nor have they done anything which might be construed as a violation of the injunction of the Circuit Court. The cause referred to by Moffat, as they have been advised and believe, involves the same questions as the present controversy, and in the event that they shall be compelled to answer they will so set up and aver. After the decision of the Circuit Court of Appeals was announced, they consulted with their counsel as to whether drawing warrants for their salaries and the expenses of the litigation could be construed as a violation of the injunction of the Circuit Court in any particular, and only issued warrants upon the assurance of counsel that they were not prohibited from doing so. They also readily acquiesced in the action of the Auditor and Treasurer of the city in requesting an opinion of the City Attorney as to their official status, after which they issued three certificates with a view of testing their right and authority so to do in the state courts, and in so doing were advised that they were not in any manner transgressing the mandate of the court. They aver their intention of bringing suits in the discharge of their duties with a view of recovering certain money believed to be due from certain collectors of water rent and such kindred matters as may arise from time to time, but not for the purpose of raising any question already raised or decided.

*Mr. Edwin H. Park* for appellants.

*Mr. W. H. Bryant*, with whom *Mr. William P. Malburn* and *Mr. Thos. R. Woodrow* were on the brief, for appellees.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The merits of the controversy are not involved. The sole question is whether there was collusion to give the court jurisdiction of the cause, and, of course, the existence of collusion implies the existence of fraud. Is fraud shown? Between the parties there is the requisite diversity of citizenship, requisite amount and the complainants (appellants here) had such relation to the matters charged as to give them a standing to litigate their legality. They were solicited to bring the suit, however, and they were indemnified against liability for cost and counsel fees. Was this enough to make their proceeding collusive? To answer the question we must keep in mind the situation. The Utilities Commission was alleged to be an unconstitutional body and its expenditures illegal. Indeed this had been decided, but injury from its action still impended or was believed to impend. Litigation was threatened or believed to be threatened in the state courts; in other words, there was a purpose to change the forum of the litigation and possibly its results. The belief may have been unfounded; it cannot be said that it was not honestly entertained. Against these circumstances what is opposed? It is said that the water company was the party who desired the suit to be brought and that the suit was brought for its benefit and at its instance and request, and upon an express contract to pay the costs of litigation and counsel fees which might be incurred. A great deal of this is assumption, the water company admits

its interest, but the appellants also have interest; but mere unity of interest or difference in its degrees is not enough, there must be an illegal purpose. If the interest was real and the peril which threatened was real or thought to be real, unity of interest or contribution of expenses cannot be regarded as necessarily proof of collusion. *Chicago* v. *Mills*, 204 U. S. 321. And the cases are numerous in which it has been decided that the motives of litigants in seeking Federal jurisdiction are immaterial. *Blair* v. *Chicago*, 201 U. S. 400, and cases cited.

*Cashman* v. *Amador &c. Canal Co.*, 118 U. S. 58, is relied on. The case is distinguishable from the case at bar. Cashman was an alien and brought suit against the Canal Company claiming that his land was injured by the debris thrown on it by the working of certain mines by hydraulic process. The suit was instituted at the instance of the County of Sacramento, the County not being able to bring suit in the Federal court. There was a cause of action in Cashman; there was a disability on the part of the county to sue in the Federal court in its own name. So far there is resemblance to the case at bar, but there are material differences between the agreement in that case and the agreement between the parties in this. The County was to pay the expenses, engage counsel and indemnify Cashman against all charges and expenses, and he stipulated "not to compromise, dismiss, or settle the said suit without the consent of the County of Sacramento, and to allow said County and the attorneys aforesaid in its behalf to manage and conduct the said suit to the same extent and in the same manner as if such suit had been commenced by and was prosecuted in the name of the said County of Sacramento." It is manifest, as this court said, from the very beginning the suit was in reality the suit of the County, with a party plaintiff "collusively made" for the purpose of creating a case cognizable "by the Circuit Court of the United

States." In other words, as was said, the "dispute and controversy" which was "involved" was nominally between Cashman, an alien, and the defendants, citizens of California, but was "really and substantially" between one of the counties of California and citizens of that State, and thus not "properly within the jurisdiction" of the Circuit Court.

The case at bar has no such features. It is not under the control of the water company. It was brought by appellants, they having a justiciable controversy, well or ill-founded, and which it was desired to be determined in a Federal court, they being non-residents of Colorado and citizens of other States.

It is true by the decision of this court in *The City and County of Denver et al.* v. *The New York Trust Company et al.*, and *Same* v. *The Denver Union Water Company et al.*, *ante*, p. 123, the merits of the controversy have been decided against them, but they must be judged as of the time their suit was begun, and, so judged, we think the suit was not collusively brought and should not have been dismissed for want of jurisdiction. The decree dismissing it is, therefore,

*Reversed.*

MR. JUSTICE DAY dissents.